June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Anthony Birong to you for a position as a law clerk in your chambers. I am pleased to write this letter because Mr. Birong is an outstanding law student and is exceptionally bright .

Mr. Birong was a student in my Lawyering Skills I and II courses during the 2021-22 school year and was a research fellow for me for the Lawyering Skills course this past year. Lawyering Skills is a year-long, six-credit first-year course where students are introduced to most of the basic skills a lawyer needs to practice law effectively. In Lawyering Skills I students learn expository writing by preparing office memoranda. Students also learn legal research and analysis through a series of writing assignments. Students also prepare email memos. In Lawyering Skills II students learn persuasive writing and advanced research skills and strategies when they prepare a motion for summary judgment. In addition, students engage in oral argument and negotiation. Drafting, client interviewing and counseling, and problem-solving skills are also introduced, and students prepare written documents to demonstrate their mastery of those skills. I meet with students individually numerous times to review their written work, and I become well-acquainted with them.

From my first encounter with Mr. Birong, I was impressed with Mr. Birong's abilities and intellect. I learned he had served on swift boats in the U.S. Navy; an impressive military experience. He possesses a superior intellect, and he is an accomplished legal writer. He has outstanding research skills, and a creative and inquiring mind. I have found students who have served in the military have superior teamwork skills and know how to work diligently. He often identifies issues no one else uncovers. His work is consistently excellent and timely. He was a frequent class participant, and his comments were always incisive. All the projects he completed in Lawyering Skills provide examples of his excellent writing ability and superior analytical ability.

Mr. Birong is generous to other law students and knows how to work as a team member. Due to his intellect and skills, I asked him to be a Research Fellow for my Lawyering Skills class this academic year. In choosing Research Fellows I look for bright, diligent, thorough, and kind students who like to mentor first-year students, and Mr. Birong was my top choice this year. He met regularly with my students, reviewed their draft assignments, and provided commentary to them and to me. He is an excellent editor and has improved the writing skills of many of my students. His generosity and willingness to mentor and help other law students is exemplary. In my experience, the brightest people I know are usually the most generous. Students report how much they have benefitted from his guidance, and his dedication to them is was obvious. His work was timely and thorough even when he was occupied in other student organizations and activities.

Even at this early stage of his legal career, Mr. Birong's work is better than many practicing lawyers. Undoubtedly, he will be an outstanding law clerk and lawyer. I would feel comfortable having him as my attorney. He has worked on a number of research projects for me, and I can rely on his analysis and research. He has great judgment, has the ability to identify issues many others miss, and has all the characteristics of an accomplished lawyer.

Mr. Birong is a person with a great sense of humor, and he is humble and trustworthy. His keen judgment and exemplary character are just two of his attributes. I am willing to recommend him enthusiastically for any position of responsibility. I have no hesitancy about recommending him to you, and I am happy to answer any questions you may have about him.

Very truly yours,

Grace C. Tonner

(949) 824-4037

gtonner@law.uci.edu

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Anthony Birong

Dear Judge Walker:

I write to recommend that you hire Anthony Birong as one of your judicial clerks. In his first semester of law school, Anthony was a student in my first-year Contracts class (called Common Law Analysis: Contracts). Anthony was an active participant in class discussions. I use the Socratic Method but rely on volunteers. Anthony was one of the few students who was always willing to engage. His comments were unfailingly thoughtful and on point. Anthony performed excellently in the class, writing a very strong final. Overall, it was a real standout performance and earned him an A in a very competitive class.

Although the class had 43 students, I got to know Anthony very well during office hours and other events outside of class. He is intellectually curious and whip smart. I thought so highly of Anthony that I asked him to be my Research Assistant. Anthony has performed extensive research for my project on banking deserts, which are communities without access to bank branches. He wrote memoranda about relationship lending, the practice of bankers extending credit based on personal knowledge of the borrower as opposed to credit scores and hard data. Anthony researched historical changes in relationship lending and how minority buyers now rely on relationship lending. He studied DOJ Banking Merger Guidelines, including how the Federal Reserve defines geographic markets. In addition to discussing several bank merger cases in the last 40 years, Anthony also performed a case study on a bank merger that proved pivotal in my scholarship. Overall, this project involved extensive factual, legal, and empirical research.

Beyond this large-scale project, Anthony also performed research on price-fixing defendants who argue that they cannot be liable for price fixing because they cheated on the cartel agreement. This is a particularly difficult assignment that I have had previous research assistants attempt. Anthony found relevant caselaw that others had not. I was very impressed with his research skills. Finally, he researched caselaw interpreting and applying summary judgement standards in antitrust and non-antitrust opinions. His work product was exactly what I asked for and was very helpful.

In addition to his original research, Anthony proofread and provided useful comments on several of my projects, including a new edition of an Antitrust Law casebook that I co-author, an article on how predatory pricing jurisprudence has influenced antitrust doctrine, and a paper on how the Respect for Marriage Act applies to U.S. territories. For each project, Anthony provided valuable suggestions that improved my scholarship. This bodes well for his ability to work with his co-clerks to improve their bench memos and draft opinions.

Anthony is an incredibly hard worker. During his first summer, he performed this research in addition to his full-time externship with a federal judge. Anthony never begrudges hard work and approaches all tasks with enthusiasm and a great attitude. He asks smart questions and is always clear on deadlines and expectations.

Finally, on a personal level, Anthony is one of the nicest, most humble people you will ever meet. He is always upbeat and generous, with an excellent sense of humor. I have enjoyed my conversations with him immensely.

In sum, Anthony would be a great addition to your chambers. If you have any questions, please feel free to contact me at cleslie@law.uci.edu or (949) 824-5556.

Sincerely,

Christopher Leslie
Chancellor's Professor of Law

ANTHONY BIRONG
5104 Palo Verde Road, Irvine, CA 92617 • abirong@lawnet.uci.edu • (562) 370-6354

The attached writing sample is an order I drafted as a judicial extern to the Honorable Otis D. Wright II. This order was lightly edited by Judge Wright's clerks and reviewed by Judge Wright. Names and dates have been changed or redacted per Judge Wright's requirements. I have received permission to use this order as a writing sample.

ANTHONY BIRONG
5104 Palo Verde Road, Irvine, CA 92617 ● abirong@lawnet.uci.edu ● (562) 370-6354

I. INTRODUCTION

On [redacted], Plaintiff Lola Jackson initiated this action in state court against Defendants ABC Co. and "Devin," an individual. (Notice of Removal ("NOR"), Ex. 1 ("Complaint" or "Compl."), ECF No. 1-1.) On [redacted], ABC removed the case to this Court based on diversity jurisdiction. (NOR, ECF No. 1.) Jackson now moves to remand. (Mot. Remand ("Motion" or "Mot."), ECF No. 20.) For the reasons below, the Court finds it has subject matter jurisdiction and accordingly **DENIES** Jackson's Motion.[1]

II. BACKGROUND

As Jackson alleges, on [redacted], Jackson was visiting ABC's store to purchase miscellaneous items. (Compl. ¶¶ 8, 14.) After entering the store, Jackson slipped on a substance on the floor and fell, sustaining injuries. (*Id.*) Jackson alleges that an individual named Devin was the supervisor of the store responsible for maintenance at the time of her fall. (*Id.* ¶ 3.)

Jackson originally filed this action in state court, asserting causes of action for negligence and premises liability against ABC and "Devin." (*Id.* ¶¶ 7–17.) ABC later removed this action to federal court based on diversity jurisdiction, asserting that: (1) ABC is a citizen of Arkansas and Delaware; (2) Jackson is a citizen of California; (3) Devin's citizenship should be disregarded; and (4) the amount in controversy exceeds $75,000. (NOR 3.) ABC therefore contends that this Court has subject matter jurisdiction.

On [redacted], the Court questioned its jurisdiction and ordered ABC to show cause why this action should not be remanded to state court for lack of subject matter jurisdiction. (Order Show Cause ("OSC"), ECF No. 10.) On [redacted], ABC responded to the Court's Order to Show Cause, (Resp. OSC, ECF No. 11), and amended its Notice of Removal, (Am. NOR, ECF No. 11). On [redacted], the Court, satisfied with ABC's showing

[1] Having carefully considered the papers filed in connection with the Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

ANTHONY BIRONG
5104 Palo Verde Road, Irvine, CA 92617 ● abirong@lawnet.uci.edu ● (562) 370-6354

and amended notice of removal, discharged the Order to Show Cause. (Min. Order, ECF No. 13.)

Subsequently, on [redacted], Jackson moved to remand on the ground that ABC failed to establish diversity jurisdiction. (*See generally* Mot.) In her Motion, Jackson asserts that Devin, whose real identity is unknown, is a citizen of California and defeats diversity. (*Id.* at 21.) Jackson also contends that ABC has failed to establish that the amount in controversy exceeds $75,000. (*Id.* at 23.) Finally, Jackson seeks attorneys' fees in association with her Motion. (*Id.* at 28–30.) ABC opposes the Motion. (*See* Opp'n, ECF No. 22.) Jackson did not file a Reply.

III. LEGAL STANDARD

Federal courts have subject matter jurisdiction only as authorized by the Constitution and Congress. U.S. Const. art. III, § 2, cl. 1; *see also Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). When a suit is filed in state court, the suit may be removed to federal court only if federal court would have had original jurisdiction. 28 U.S.C. § 1441(a). Federal courts have original jurisdiction when an action arises under federal law or where there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000. *Id.* §§ 1331, 1332(a).

Courts strictly construe the removal statute against removal and "federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). The party seeking removal bears the burden of establishing federal jurisdiction. *Id.*

IV. DISCUSSION

The Court finds that it has subject matter jurisdiction because the parties are diverse and the amount in controversy is met. Accordingly, as explained below, the Court denies Jackson's Motion to remand and request for attorneys' fees.

A. Diversity of Citizenship

At the outset, it is uncontroverted that there is complete diversity of citizenship between Jackson and ABC. Jackson is a citizen of California and ABC is a citizen of

ANTHONY BIRONG
5104 Palo Verde Road, Irvine, CA 92617 ● abirong@lawnet.uci.edu ● (562) 370-6354

Delaware, where it is incorporated, and of Arkansas, where it holds its principal place of business. (NOR 3.) However, Jackson contends that ABC has failed to establish diversity of citizenship because Jackson alleges that Devin is a citizen of California. (Mot. 2, 21; Compl. ¶ 3.) The Court disagrees, and finds that the parties are diverse from each other because Devin is a fictitious defendant whose citizenship may be disregarded.

"In determining whether a civil action is removable on the basis of jurisdiction under section 1332(a) . . . the citizenship of defendants sued under fictitious names shall be disregarded." 28 U.S.C. § 1441(b)(1). The Ninth Circuit has explicitly held that "[t]he citizenship of fictitious defendants is disregarded for removal purposes and becomes relevant only if and when the plaintiff seeks leave to substitute a named defendant." *Soliman v. Philip Morris Inc.*, 311 F.3d 966, 971 (9th Cir. 2002).

Some courts have found a distinction between "fictitious" and "real" Does. *See, e.g.*, *Gardiner Fam., LLC v. Crimson Res. Mgmt. Corp.*, 147 F. Supp. 3d 1029, 1036 (E.D. Cal. 2015). Courts considering this distinction assess whether the "[p]laintiffs' description of Doe defendants or their activities is specific enough as to suggest their identity, citizenship, or relationship to the action." *Id.*; *see Johnson v. Starbucks Corp.*, 475 F. Supp. 3d 1080, 1083 (C.D. Cal. 2020).

Jackson contends that Devin is not "wholly fictitious" and may not be disregarded. (Mot. 21.) The Court disagrees. Without including a last name or any other identifying details, Jackson merely identifies Devin as "a supervisor and/or manager of the store at the time of Plaintiff's slip and fall" who was "responsible for the maintenance of the store." (Compl. ¶ 3.) This description is not specific enough to suggest Devin's identity and therefore is insufficient to render Devin a real Defendant.

Moreover, Jackson has been unable to supplement Devin's identity, even after conducting discovery. ABC provided Jackson witness statements and an incident report. (*See* Decl. [redacted] ISO Opp'n ¶¶ 6, 7, Exs. 1, 2, ECF No. 22-3.) Neither lists any employee named Devin. At the time of the incident, there were no managers responsible

ANTHONY BIRONG
5104 Palo Verde Road, Irvine, CA 92617 ● abirong@lawnet.uci.edu ● (562) 370-6354

for maintenance of the store named Devin.[2] (Decl. [redacted] ISO Am. NOR ¶ 8, ECF No. 12-12.)

Therefore, Devin is a fictitious defendant. Pursuant to the plain language of 28 U.S.C. § 1441(b)(1) and Ninth Circuit precedent, this Court cannot consider Devin's citizenship unless and until Jackson seeks leave to substitute a named defendant. Accordingly, this Court looks only to the citizenships of Jackson and ABC and finds that complete diversity exists for the purpose of establishing subject matter jurisdiction.

B. Amount in Controversy

Jackson contends that ABC fails to establish that the amount in controversy exceeds $75,000. (Mot. 23–26.) However, the Court finds that the amount in controversy is met because Jackson has previously admitted that the amount in controversy exceeds $75,000.

"[A] defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 89 (2014). If the plaintiff disputes the alleged amount in controversy, "both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied." *Id.* at 88. "The parties may submit evidence outside the complaint, including affidavits or declarations, or other 'summary-judgment-type evidence relevant to the amount in controversy at the time of removal.'" *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015) (quoting *Singer v. State Farm Mut. Auto. Ins. Co.*,

[2] In any case, as ABC correctly points out, a person's place of employment alone does not implicate their citizenship status. *See Garcia v. Walmart, Inc.*, No. 2:22-cv-00371-SVW-MRW, 2022 WL 796197, at *3 (C.D. Cal. March 16, 2022) ("[A] person's place of employment does not certainly implicate their citizenship status, especially in a state as diverse as California comprised of out-of-state college students, immigrants from different countries and many other multinationals." (internal quotation marks omitted)). Therefore, even if Devin was properly identified as a real party to this action, the Court still could not, at this time, conclude that Devin indeed is a California citizen and defeats diversity.

ANTHONY BIRONG
5104 Palo Verde Road, Irvine, CA 92617 ● abirong@lawnet.uci.edu ● (562) 370-6354

116 F.3d 373, 377 (9th Cir. 1997)). "[A] defendant cannot establish removal jurisdiction by mere speculation and conjecture, with unreasonable assumptions." *Id.*

Jackson does not allege a specific amount of damages, but seeks to recover general damages, medical expenses, loss of earnings, interest, and costs of suit. (Compl. 5, Prayer for Relief.) ABC plausibly alleges that the amount in controversy exceeds $75,000, (NOR 3), and supports this allegation with Jackson's own admission, in response to ABCs Request for Admissions, that her damages exceed $75,000, (Decl. [redacted] ISO NOR ("[redacted] Decl. ISO NOR"), Ex. 7 No. 48, ECF No. 1-7; [redacted] Decl. ISO NOR, Ex. 8 No. 48, ECF No. 1-8). Thus, ABC has established removal jurisdiction with evidence rather than by mere speculation and conjecture based on unreasonable assumptions. *See Garcia*, 2022 WL 796197, at *1 n.1 (C.D. Cal. Mar. 16, 2022) (finding that the amount in controversy was satisfied because in the plaintiff's response to requests for admission, the "Plaintiff explicitly admitted that he seeks damages in excess of $75,000"). Accordingly, the Court finds the amount in controversy exceeds $75,000 for the purpose of establishing diversity jurisdiction and that the Court therefore finds that it has subject-matter jurisdiction over this action.

V. CONCLUSION

For the reasons discussed above, the Court **DENIES** Jackson's Motion to Remand, (ECF No. 20), and **DENIES** Jackson's request for attorneys' fees and costs incurred in association with the Motion.

Applicant Details

First Name	**Cameron**
Middle Initial	**L**
Last Name	**Bishop**
Citizenship Status	**U. S. Citizen**
Email Address	**cbishop@albanylaw.edu**
Address	**Address** Street **415 Engleman Avenue** City **Scotia** State/Territory **New York** Zip **12302** Country **United States**
Contact Phone Number	**5188594771**

Applicant Education

BA/BS From	**Siena College**
Date of BA/BS	**January 2021**
JD/LLB From	**Albany Law School** **http://www.albanylaw.edu/**
Date of JD/LLB	**May 17, 2024**
Class Rank	**10%**
Law Review/Journal	**Yes**
Journal(s)	**Albany Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Domenick L. Gabrielli Appellate Advocacy Moot Court Competition** **Donna Jo Morse Client Counseling Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Wetmore, Michael
mwetm@albanylaw.edu
Connors, Patrick
pconn@albanylaw.edu
Mayer, Connie
cmaye@albanylaw.edu
(518) 445-2393

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Cameron Bishop
415 Engleman Avenue, Scotia, New York 12302 · cbishop@albanylaw.edu · +1 (518) 859-4771

June 12, 2023

The Honorable Jamar K. Walker
United States District Court, Eastern District of Virginia

Dear Judge Walker,

I write to express my interest in a clerkship in your chambers beginning in the 2024 term. I am a third-year student in the top 7% of my class at Albany Law School and have been interested in the federal judiciary since beginning law school. I achieved academic success in law school while simultaneously working part-time with a small law firm and interning with the Schenectady County District Attorney's Office. I would like to increase my knowledge of the federal court system and bring my strong research and writing abilities to the work of your chambers.

In law school, I have taken a particular interest in classes focused on federal laws. I have specifically enjoyed my time as a teaching assistant for Federal Civil Procedure, where I assisted the professor in helping students and reviewing their essays. I have furthered my interest in the judiciary by competing in Albany Law School's Gabrielli Appellate Advocacy Competition (Gabrielli Competition), where I was a finalist and won Best Oral Advocate Award in the competition. My experience as a sub-editor with the *Albany Law Review* has also improved my legal writing and research skills. I purposefully decided not to run for a position on the editorial board of the *Albany Law Review* because of my desire to engage in pro-bono work through the New York State Pro Bono Scholars Program next spring to give back to the community that has provided me with so much. If accepted into the program, I would complete the Uniform Bar Exam in February 2024 and graduate in May 2024. I will return to the *Albany Law Review* as an associate editor this fall.

As an intern with the Schenectady County District Attorney's Office for the last year, I wrote the respondent's brief for the appellate court in several cases. I also wrote letters to the Court of Appeals requesting the denial of the appellants' requests for leave to appeal and responses to the defendants' motions seeking relief under the Criminal Procedure Law § 440. This experience has enriched my understanding of the courts, and I would like to deepen that knowledge with experience in the federal judiciary through your chambers.

Enclosed please find my resume, law school transcript, writing sample, and letters of recommendation. My writing sample is the portion of my respondent's brief that I drafted for the Gabrielli Competition. Professors Connie Mayer, Patrick Connors, and Michael Wetmore have written my letters of recommendation. Upon your request, I would be happy to provide you with any additional information you wish to review. Thank you for considering my candidacy. I hope to have the opportunity to interview with you.

Sincerely,

Cameron Bishop

Cameron Bishop

Cameron Bishop
415 Engleman Avenue, Scotia, New York 12302 · cbishop@albanylaw.edu · +1 (518) 859-4771

EDUCATION

Albany Law School of Union University, Albany, NY
Candidate for Juris Doctor, May 2024
Class Rank: Top 7% (13/188: GPA: 3.92)
Honors: *Albany Law Review*; Dean Thomas Sponsler Honors Teaching Fellowship Program; Dean's List (Fall 2021 - Spring 2023)
Activities: Domenick L. Gabrielli Appellate Advocacy Moot Court Competition, Finalist and Best Oral Advocate; Donna Jo Morse Client Counseling Competition, Participant; Federal Civil Procedure and Criminal Law, Teaching Assistant

Siena College, Loudonville, NY
Bachelor of Arts, *magna cum laude*, Political Science, Pre-Law Certificate, December 2020
GPA: 3.74
Honors: Standish Honors Program; Pi Sigma Alpha and Pi Gamma Mu Honor Societies
Activities: Captain, Siena College Mock Trial Team

RELEVANT EXPERIENCE

Hon. Mae D'Agostino, U.S. District Court, N.D.N.Y., Albany, NY
Legal Intern To Commence August 2023

Professor Connie Mayer, Albany Law School, Albany, NY
Research Assistant To Commence August 2023

Barclay Damon LLP, Syracuse, NY
Summer Associate May 2023 – Present

- Conduct legal research on various federal issues including diversity of jurisdiction and amending pleadings
- Prepare legal memoranda regarding potential causes of action

Schenectady County District Attorney's Office, Schenectady, NY
Legal Intern June 2022 – May 2023

- Drafted appellate briefs and responses to motions
- Researched and applied case law to address issues on appeal
- Appeared on the record in city court regarding defendants' detainment status

RoseWaldorf PLLC, Albany, NY
Intake Coordinator March 2021 – May 2023

- Opened case files for claims and lawsuits
- Analyzed applicable rules and laws to calculate the due date for pleadings

OTHER EXPERIENCE

Pizza Hut, Clifton Park/Glenville, NY
Shift Manager November 2017 - March 2021

COMPUTER SKILLS

Proficient in LexisNexis, Westlaw, Bloomberg Law, Expert Time, iManage, PCMS, PCLaw, LawManager, IBM SPSS Statistics, Microsoft Office, and Google Suites

BISHOP, CAMERON L. TRANSCRIPT OF RECORD ISSUED: 06/10/2023

Student No. 0586848-0124

ALBANY LAW SCHOOL
80 New Scotland Avenue, Albany, NY 12208
Telephone 518-445-2330
Fax 518-472-5889

Page 1 of 1

Matriculated: 08/23/2021 Program: JD 3 Year Anticipated Degree Date: 05/24
Concentration(s): Civil Litigation; Tax Law

			CR.HR	GRADE	QPTS
FALL 2021 (08/23/2021 to 12/20/2021)					
CONX	PREYH	Contracts	3.0	B+	9.9
CIVP	CMAYE	Federal Civil Procedure	4.0	A	16.0
IIJE	AHARR	Inter/Intragenerational Jst Sm	1.0	A-	3.7
ILWF	AMOLO	Introduction to Lawyering	3.0	A	12.0
TORT	PARMS	Torts	4.0	A+	17.2
Averaged: 15.00 Earned: 15.00 Q.Pts: 58.80					
SEM: GPA 3.92 Rank 18/193 CUM: GPA 3.92 Rank 18/194					
SPRING 2022 (01/18/2022 to 05/18/2022)					
		DEAN'S LIST			
CNSL	VBONV	Constitutional Law	4.0	A	16.0
CONT	PREYH	Contracts	2.0	A-	7.4
CRIM	MWETM	Criminal Law	3.0	A-	11.1
ILWS	AMOLO	Introduction to Lawyering	3.0	A-	11.1
PROP	JROSE	Property	4.0	A-	14.8
Averaged: 16.00 Earned: 16.00 Q.Pts: 60.40					
SEM: GPA 3.78 Rank 23/190 CUM: GPA 3.85 Rank 18/190					
FALL 2022 (08/22/2022 to 12/21/2022)					
		DEAN'S LIST			
DAPL	RMERG	CLN:Alb Cnt DA FDPL Classroom	1.0	A+	4.3
FDPL	JLCON	CLN:Field Placement	3.0	P	.....
FIRS	VBONV	Con Law II: First Amendment	2.0	A	8.0
EVDC	MWETM	Evidence	4.0	A+	17.2
HNRS	CMAYE	Honors Teaching Fellowship	2.0	CR	.....
FORL	AHAYN	National Security Law	2.0	A	8.0
PUBH	AWILL	Public Health Law	3.0	A	12.0
Averaged: 12.00 Earned: 17.00 Q.Pts: 49.50					
SEM: GPA 4.13 Rank 6/184 CUM: GPA 3.92 Rank 11/185					
SPRING 2023 (01/16/2023 to 05/17/2023)					
		DEAN'S LIST			
CPAD	KSPRO	Criminal Procedure: Adjudicatn	3.0	A+	12.9
LPRF	RBRES	Legal Profession	3.0	A	12.0
NYP2	PCONN	New York Practice II	3.0	B+	9.9
PTP2	MWETM	Trial Practice II: Civil	3.0	A	12.0
Averaged: 15.00 Earned: 17.00 Q.Pts: 58.80					
SEM: GPA 3.92 Rank 24/188 CUM: GPA 3.92 Rank 13/188					
TOTALS Averaged: 58.00 Earned: 65.00 Q.Pts: 227.50					

Satisfied Upperclass Writing Requirement

STUDENT IN GOOD STANDING UNLESS OTHERWISE INDICATED

NOT VALID AS OFFICIAL WITHOUT SIGNATURE AND SEAL

FEDJ	MHUTT	Federal Jurisdiction /Practice	3.0	A	12.0
LRME	VBONV	Law Review (Membership)	1.0	CR	.....
LRWT	VBONV	Law Review (Writing)	1.0	CR	.....

ALBANY LAW SCHOOL

80 NEW SCOTLAND AVENUE ALBANY, NEW YORK 12208-3494
TEL: 518-445-3201 FAX: 518-445-2315 WWW.ALBANYLAW.EDU

June 12, 2023

To Whom It May Concern,

On behalf of one of my best students, I write this letter of recommendation in support of his candidacy for a judicial clerkship. By the date of this letter, I have recommended no other candidate for this position and would be hard-pressed to find another student matching Cameron Bishop's qualifications.

Academically, Cameron is exemplary. At Albany Law School, I teach two doctrinal courses, Criminal Law and Evidence, and an upper-level course, Trial Practice. The doctrinal courses examine the fundamental principles taught traditionally at all ABA-accredited law schools (elements of crimes and the Federal Rules of Evidence, respectively). Trial Practice, on the other hand, is an immersive experience where students learn the practical skills of a simulated jury trial. In Evidence, Cameron earned an "A+", the highest grade attainable in law school. In the other courses, he consistently performed with peer-shadowing proficiency, in the solid "A" range.

What sets Cameron apart from his peers is not just grades, however. Outside of the classroom, his unwavering commitment to analyzing complex legal issues, sharpening practical skills, and developing poignant, thought-provoking arguments puts him on another level of engagement. Last semester, Cameron was a semifinalist in the law school's most esteemed competition, the Domenick L. Gabrielli Appellate Advocacy Competition, and tied with another student for best oral advocate. In the final round, which I attended, Cameron had the most polished rhetorical prowess among the competitors, the kind exhibited by only the most seasoned advocates.

This recommendation is without any reservation. If you have any questions about Cameron or this letter, do not hesitate to contact me. I can be reached at 518-445-3201.

Yours sincerely,

Michael C. Wetmore
Visiting Assistant Professor of Law
mwetm@albanylaw.edu

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing this letter on behalf of a student, Cameron Bishop, who was in my New York Practice II class in the Spring 2023 Semester. Cameron is applying for a clerkship in your chambers.

New York Practice is Albany Law School's comprehensive review of the CPLR, which totals 6 credits. The course, originally designed by Professor David D. Siegel, is the most detailed course offered on the subject of New York Practice and is one of the most demanding courses offered at Albany Law School.

Cameron received a B+ in my New York Practice II course, which was an impressive achievement. Cameron was a second-year student in the class and was competing against third-year students who had already taken New York Practice I. Cameron wisely decided to take New York Practice II in his second year of law school because his schedule would not permit him to take the course in his third year. This required a great deal of preparation because the material covered in New York Practice II builds on knowledge obtained in the New York Practice I course.

Cameron worked very hard to learn the material and proved to be one of the finest students in the class. He demonstrated an admirable work ethic and was always prepared to discuss the detailed procedural issues we covered during class. He participated in almost every class! Therefore, it was no surprise when he received such a high grade in New York Practice II. I look forward to Cameron taking my New York Practice I class this fall.

Cameron's performance in my classes is typical of the high level of performance he achieved throughout his law school career and reflects the enthusiasm he brings to his studies. It is no surprise that he is ranked so highly in his class and is a Subeditor of the Albany Law Review. He also participated in the Domenick L. Gabrielli Appellate Advocacy Moot Court Competition, where he was a Finalist and Best Oral Advocate.

In addition to Cameron's hard work ethic, he is also a very intelligent and cordial person. I believe he possesses all of the skills necessary to be an outstanding law clerk. I clerked for Judge Richard D. Simons at the New York Court of Appeals from 1988 through 1991. During that time, I realized that judges and courts need law clerks who are not only bright, but mature and compatible. I firmly believe that Cameron satisfies all of these qualifications. He would be a strong asset to your chambers.

Please feel free to contact me if you have any questions regarding Cameron.

Thank you for your consideration in this matter.

Respectfully,

Patrick M. Connors
pconn@albanylaw.edu
518-445-2322

ALBANY LAW SCHOOL
80 NEW SCOTLAND AVENUE, ALBANY, NEW YORK 12208-3494
TEL: 518-445-2311 FAX: 518-445-2315 WWW.ALBANYLAW.EDU

June 6, 2023

Re: Application of Cameron Bishop

To Whom it May Concern:

I am pleased to write this letter in support of the application of Cameron Bishop for a clerkship position. I have known Mr. Bishop since the fall of 2021 when he was a first-year law student in my Civil Procedure class. As a second-year law student, Mr. Bishop was invited to participate in the Sponsler Teaching Fellows Program and served as my teaching assistant for Civil Procedure in the fall of 2022 and for Criminal Law in the spring of 2023. Because I have had the pleasure of working with Mr. Bishop as a student and a teacher/mentor to other law students, I have had the opportunity to observe the quality of his work and I believe I am uniquely positioned to describe his professional attributes and qualifications. He is clearly within the top 5% of the students I have taught at Albany Law School.

Mr. Bishop is one of the brightest, hardest-working students I have ever had. As a student in my Civil Procedure class, Mr. Bishop distinguished himself from the very beginning of his law school career by demonstrating an excellent ability to spot relevant issues and analyze the legal and policy implications raised by those issues. He was always well-prepared for class and made a careful and thoughtful analysis of the cases and issues we were discussing. During class discussions, he often asked questions and raised issues that went beyond the cases we were discussing, leading to a richer and more meaningful class discussion. He demonstrated strength in oral communication and excellent analytical skills.

Because of his superior academic performance in his first year of law school, he was invited to participate in the Sponsler Teaching Fellows Program. The Sponsler Teaching Fellows Program is a highly selective academic honors program in which students ranked in the top 10% of their class at the end of their first year of law school are invited to assist in teaching and mentoring in the first-year curriculum. Mr. Bishop was assigned to my Civil Procedure class as a Sponsler Fellow in the fall of 2022 and was so effective that I asked him to continue in his teaching role in my Criminal Law course in the spring of 2023. He was extremely organized and conscientious, providing outstanding guidance and mentoring to the first-year students. He was available on a weekly basis to tutor students individually and organized review sessions periodically throughout both semesters. His presentations were easily understandable and accessible to his students. He provided clear feedback to students on their written work and assisted them with outlining the subject matter and organizing their materials. He was able to

work under pressure and meet every deadline while balancing his full course load, Law Review responsibilities, and Moot Court work. He was invaluable in assisting students in their learning process and those students regularly benefitted from his critical insights.

Throughout the two semesters, I have had many opportunities to observe and review Mr. Bishop's written and oral communications. His critical thinking skills and legal analysis are superior and his writing is thorough, detailed, clear, and precise. His strength in oral communication was demonstrated both in the classroom as a student and as a teaching assistant, and outside the classroom through his participation in Moot Court. Mr. Bishop was a finalist in the Gabrielli Appellate Advocacy Competition and was named Best Oral Advocate in the competition for 2023.

On a personal level, Mr. Bishop is responsible, trustworthy, and dependable. He never missed a deadline or turned in work that was anything but excellent. I recommend Mr. Bishop without reservation. He will bring outstanding written, oral and analytical skills, and a sound work ethic to the position. His exceptional academic record and intellect will make him an asset to your office. If you have any questions about this recommendation, please feel free to contact me as set out below.

Sincerely,

Connie Mayer
Raymond and Ella Smith Distinguished Professor of Law
ALBANY LAW SCHOOL
80 New Scotland Ave | Albany, NY 12208
P: 518.445.2393 | F: 518.445.3281
E-mail: **cmaye@albanylaw.edu**

Cameron Bishop
415 Engleman Avenue, Scotia, New York 12302 · cbishop@albanylaw.edu · +1 (518) 859-4771

WRITING SAMPLE

This is my section of my appellate brief I wrote for Albany Law School's Gabrielli Appellate Advocacy Competition, where I was a finalist and won the Best Oral Advocate Award in the competition. The issue in my brief was arguing that the stop and frisk of the defendant, Nicholas Miller, did not violate his Fourth Amendment Rights. The analysis focused on two specific frisks of Mr. Miller's person: (1) the search of Mr. Miller's pant pocket, and (2) the search of his hoodie pocket. The statement of the case, summary of the argument, standard of review, and second argument of the brief sections are omitted as they were written together with my partner in the competition. The argument in this writing sample is exclusively my own writing.

ARGUMENT

I. THE NEW SCOTLAND SUPREME COURT, APPELLATE DIVISION CORRECTLY AFFIRMED THE TRIAL COURT'S DECISION TO DENY THE APPELLANT'S MOTION TO SUPPRESS THE OUNCE OF HEROIN FOUND IN HIS SWEATSHIRT POCKET DURING A SEARCH BY THE POLICE AND THAT SEARCH DID NOT VIOLATE HIS FOURTH AMENDMENT RIGHTS.

The defendant's Fourth Amendment rights were not violated when Officers Schmidt and Bishop reasonably performed a *Terry* stop and frisk on him. The frisk was reasonable under the totality of the circumstances.

It is undisputed that citizens of the United States ("U.S.") have a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Furthermore, "the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth [Amendment]." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The Supreme Court has held that "in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1, 19–20 (1968). This two-pronged analysis requires that:

> First, the investigatory stop must be lawful. That requirement is met in an on-the-street encounter, *Terry* determined, when the police officer reasonably suspects that the person apprehended is committing or has committed a criminal offense. Second, to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous.

Ariz. v. Johnson, 555 U.S. 323, 326–27 (2009). *See also U.S. v. Robinson*, 846 F.3d 694, 698 (4th Cir. 2017).

As it pertains to whether it was reasonable for the officer to stop an individual, it has been held that "an officer may conduct a brief investigatory stop if he has a **reasonable,**

articulable suspicion that criminal activity is afoot." *U.S. v. Romain*, 393 F.3d 63, 71 (1st Cir. 2004) (citing *Terry*, 392 U.S. at 30) (emphasis added). In this analysis, "the totality of the circumstances—the whole picture—must be taken into account." *U.S. v. Cortez*, 449 U.S. 411, 417 (1981). The key component in looking at the totality of the circumstances is "to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *U.S. v. Arvizu*, 534 U.S. 266, 273 (2002) (citing *Cortez*, 449 U.S. at 417–418). The reasonable suspicion that arose from the totality of the circumstance "must be measured by what the officers knew before they conducted their search." *Fla. v. J.L.*, 529 U.S. 266, 271 (2000). Furthermore, "the showing required to meet this standard is **considerably less demanding** than that required to make out probable cause, [but] the officer nonetheless must possess (and be able to articulate) more than a hunch, an intuition, or a desultory inkling of possible criminal activity." *Romain*, 393 F.3d at 71 (citing *Terry*, 392 U.S. at 27) (emphasis added).

Courts have held that several factors in the totality of the circumstances weigh in favor of the reasonableness of the *Terry* stop, such as the "area's disposition toward criminal activity, [and] the time of night." *U.S. v. Guardado*, 699 F.3d 1220, 1223 (10th Cir. 2012) (citing *Ill. v. Wardlow*, 528 U.S. 119, 124 (2000); *U.S. v. McHugh*, 639 F.3d 1250, 1257 (10th Cir.2011); *U.S. v. Clarkson*, 551 F.3d 1196, 1202 (10th Cir. 2009)). Another factor courts consider is when an individual "matche[s] the tipster's description." *U.S. v. Sims*, 296 F.3d 284, 287 (4th Cir. 2002). Courts also consider the time of the *Terry* stop in relation to when the crime took place, and the distance from the *Terry* stop to where the crime occurred. *See U.S. v. Brown*, 159 F.3d 147, 150 (3d Cir. 1998); *U.S. v. Goodrich*, 450 F.3d 552, 562 (3d Cir. 2006); *U.S. v. Juv. TK*, 134 F.3d 899, 904 (8th Cir. 1998); *U.S. v. Tarrents*, 98 F. App'x 572, 573 (8th Cir. 2004); *U.S. v. Harley*, 682 F.2d 398, 402 (2d Cir. 1982); *U.S. v. Mayo*, 361 F.3d 802, 805–06 (4th Cir.

2004).

After the stop, the officer may search the individual where the "purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence, and thus the frisk for weapons might be equally necessary and reasonable." *Adams v. Williams*, 407 U.S. 143, 146 (1972) (citing *Terry*, 392 U.S. at 30). However, "to proceed from a stop to a frisk (pat down for weapons), the officer must reasonably suspect that the person stopped is armed and dangerous." *Johnson*, 555 U.S. 323. The Supreme Court has defined "reasonable suspicion" as "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21. *See also U.S. v. Berry*, 670 F.2d 583, 598 (5th Cir. 1982). Reasonable suspicion for a frisk exists where "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27. However, "[i]n the case of the self-protective search for weapons, [the officer] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous."' *Sibron v. N.Y.*, 392 U.S. 40, 64 (1968) (citing *Terry* 392 U.S.). Factors that can justify reasonable suspicion includes "the time of day, flight, the high crime nature of the location, furtive hand movements, an informant's tip, a person's reaction to questioning, a report of criminal activity or gunshots, and the viewing of an object or bulge indicating a weapon." *Anderson v. U.S.*, 658 A.2d 1036, 1038 (D.C. 1995) (citing *Williams*, 407 U.S. at 147–48; *Cousart v. U.S.*, 618 A.2d 96 (D.C.1992); *Williamson v. U.S.*, 607 A.2d 471 (D.C.1992); *Gomez v. U.S.*, 597 A.2d 884 (D.C.1991); *Duhart v. U.S.*, 589 A.2d 895 (D.C.1991); *Stephenson v. U.S.*, 296 A.2d 606 (D.C.1972)).

During such a frisk, courts have held that "*Terry* does not in terms limit a weapons search to a so-called 'pat down' search. Any limited intrusion designed to discover guns, knives,

clubs or other instruments of assault are permissible." *U.S. v. Hill*, 545 F.2d 1191, 1193 (9th Cir. 1976). *See also U.S. v. Reyes*, 349 F.3d 219, 225 (5th Cir. 2003); *U.S. v. Baker*, 78 F.3d 135, 138 (4th Cir. 1996); *U.S. v. Hawkins*, 830 F.3d 742, 745 (8th Cir. 2016). Generally, police officers are "authorized to take such steps as [are] reasonably necessary to protect their personal safety and to maintain the status quo during the course of [a] stop." *U.S. v. Hensley*, 469 U.S. 221, 235 (1985). An officer's "inability to determine from a pat-down whether [a] pocket of [a] bulky coat contained a weapon, justifie[s] [a] probe of the pocket." *U.S. v. Thompson*, 597 F.2d 187, 191 (9th Cir. 1979). In fact, "the Fourth Amendment permits non-intrusive, reasonable means other than a frisk where . . . the other means are necessary in the circumstances to ensure that the suspect is not armed." *U.S. v. Edmonds*, 948 F. Supp. 562, 566 (E.D. Va. 1996), *aff'd*, 149 F.3d 1171 (4th Cir. 1998), *cert. denied*, 525 U.S. 912 (1998). This "includ[es] reaching into a suspect's coat pocket and lifting a suspect's shirt." *U.S. v. Terry*, 718 F. Supp. 1181, 1187 (S.D.N.Y. 1989), *aff'd*, 927 F.2d 593 (2d Cir. 1991) (citing *Thompson*, 597 F.2d at 191; *Hill*, 545 F.2d at 1193). A search beyond a "pat down" must be "reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man." *Sibron*, 392 U.S. at 65. In reviewing such a search:

> A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, itself, render the search unreasonable."

U.S. v. Sharpe, 470 U.S. 675, 686–87 (1985) (citing *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973); *U.S. v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976)). *See also Mich. v. Long*, 463 U.S. 1032, 1052 (1983); *U.S. v. Sokolow*, 490 U.S. 1, 11 (1989). Notably, "[t]he question is not

simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize it or to pursue it." *U.S. v. Sanders*, 994 F.2d 200, 204 (5th Cir. 1993). Indeed:

> If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context.

Minn. v. Dickerson, 508 U.S. 366, 375–76 (1993).

In *U.S. v. Hughes*, on September 24, 1992, Detective Robert Malmquist ("Detective Malmquist") "obtain[ed] information from a confidential informant ("C.I.") that a man named 'Lonnie,'" was selling cocaine and "often carried a gun and drove a white Cadillac," and provided Detective Malmquist with Lonnie's address ("the residence"). 15 F.3d 798, 800 (8th Cir. 1994). As a result of this information, Detective Malmquist got a search warrant to search the house the informant proved him with as well as anyone inside. *Id.* Then "[a]fter the search warrant was obtained, the officers observed the residence a number of times over several days looking for the return of the white Cadillac." *Id.*

Five days later, "[o]n September 29, 1992, at approximately 4:00 p.m., Agent Catherine Kaminski and Detective Malmquist noticed a white Cadillac parked in front of the residence under surveillance. A license check revealed that the car was registered to . . . Lonnie Hughes" ("Hughes"). *Id.* Later "[o]n that same day, the confidential informant called [Hughes] and asked him to deliver an ounce of cocaine to him. [Hughes] allegedly told the informant that he had the cocaine, but he would be unable to deliver it and told the informant to come to the . . . residence to buy the drugs." *Id.* Then, a couple of hours later "[a]t 6:00 p.m., the officers returned to the area to execute the warrant [and] observed the white Cadillac still parked in front of the

residence, this time with three people traveling [sic] back and forth, moving things from the residence to the car." *Id.* After seeing this, "[o]ne of the individuals then got into the Cadillac and drove past Agent Kaminski and Detective Malmquist, who were able to identify the driver as Hughes. The officers followed the Cadillac until it pulled into an alley and parked." *Hughes*, 15 F.3d at 800. It was then that Hughes "got out of his car as the officers approached." *Id.*

Because of "knowledge that Hughes had a criminal history of a previous weapons violation, and the [C.I.]'s statement that [Hughes] often carried a gun, the officers performed a pat down search of [Hughes]'s clothing prior to any questioning." *Id.* When "Detective Malmquist conducted the search for weapons, he felt a bulge in appellant's left jacket pocket which turned out to be $2,390 in cash. The pat down search of [Hughes]'s left front trouser pocket revealed small lumps which [Detective] Malmquist believed to be crack cocaine." *Id.* When Detective Malmquist inspected the lumps, he "discovered that these were in fact nine rocks of crack cocaine, five of which were individually wrapped, and weighing a total of 2.5 grams. Appellant was then placed under arrest and a warrant was obtained to search appellant's car." *Id.* The subsequent "search of the trunk revealed 23 grams of crack cocaine and 6 grams of cocaine powder hidden on the underside of a child's car seat. The officers also found a fully-loaded .22 caliber revolver in an overnight bag located in the trunk of the car, next to the booster seat." *Id.* Hughes was thereafter "convicted of possession with intent to distribute cocaine base . . . and with using a firearm during and in relation to a drug trafficking offense." *Hughes*, 15 F.3d at 799.

The Court, in applying *Terry* and its progeny, reviewed whether the "evidence was seized in violation of his Fourth Amendment rights." Specifically, Hughes argued "that the search of [Hughes's] pockets exceeded the scope of a *Terry* frisk for weapons." *Id.* at 802. The

Court, in reviewing this claim, summarized the conduct of Detective Malmquist by stating that "[a]s Detective Malmquist patted down appellant's outer clothing he first discovered a large lump in appellant's front pocket which turned out to be a wad of cash. As he continued to search for weapons he patted [Hughes]'s pants pocket and felt what he 'thought would be crack cocaine.'" *Id.* The Court contrasted between *Dickerson* and found that:

> [I]n the instant case Detective Malmquist testified that when he patted down appellant's pants pocket for weapons he "could feel lumps that [he] thought would be crack cocaine." According to his testimony, Detective Malmquist's first impression was that the object was contraband; there was no further manipulation of the object. Therefore, under *Dickerson*, the officer was entitled to seize the item. We conclude the initial stop, subsequent frisk and eventual seizure of the contraband was in accord with the *Terry* test.

Id.

In this case, the seizure of the heroin from the defendant did not violate his Fourth Amendment rights. Officers Schmidt and Bishop, during their routine patrol on August 10, 2021, "between 5:35 AM and 5:40 AM, the officers received a call that there was a possible suspect in the area that had just robbed a local jewelry store. The officers were given a brief description of the suspect and were told to be on alert." Record on Appeal ("R.A.") at 10.[1] The officers eventually saw the defendant "who fit the description of the robbery suspect. Specifically, the [defendant] was just under six feet tall with an average build and was wearing what law enforcement described as a unique pair of bright orange, yellow, and green Nike sneakers." R.A. at 10. Furthermore, "[w]hen the officers continued to ask questions, [the defendant] refused to answer them." R.A. at 11. It should also be noted that the officers were in a "high crime" area that "was known that drug and black-market sales occurred often in the area." R.A. at 10. Based on the totality of the circumstances, the officers performed a *Terry* frisk

[1] All citations in the form "R.A. at __" are to the Record on Appeal.

on the defendant, who they reasonably believed to be armed and dangerous. *See Cortez*, 449 U.S. at 417. During the frisk, "the officers found in Mr. Miller's pant pocket a bag of sour patch kids, a can of Red Bull, and a receipt for the purchases. When they searched Mr. Miller's sweatshirt pocket, they discovered a total of one ounce of heroin, which had been split into several different bags." R.A. at 11.

As was the case in *Hughes*, the defendant was frisked in search of a weapon, and subsequently drugs were found in his pockets. R.A. at 11. In *Hughes* where following Detective Malmquist's frisk of Hughes, Detective Malmquist "felt a bulge in [Hughes]'s **left jacket pocket** which turned out to be $2,390 in cash" and "[t]he pat down search of appellant's **left front trouser pocke**t revealed small lumps which Officer Malmquist believed to be crack cocaine." *Hughes*, 15 F.3d at 800 (emphasis added). Similarly, here Officers Bishop and Schmidt saw a bulge "weighing down [the defendant's] **pant pocket**," and found only "a bag of sour patch kids, a can of Red Bull, and a receipt for the purchases" in his pant pocket. R.A. at 10-11 (emphasis added). Following the search of the defendant's pant pocket, the officers searched his **sweatshirt pocket** and found "one ounce of heroin, which had been split into several different bags." Since besides the pat down frisk the officers conducted on the defendant "there was no further manipulation of the object . . . under Dickerson, the officer[s] [were] entitled to seize the item[s]" in the defendant's pockets. *Hughes*, 15 F.3d at 802. *See also Terry*, 718 F. Supp. at 1187.

Even if this Court were to find "that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means . . . [that] does not, itself, render the search unreasonable." *Sharpe*, 470 U.S. at 687. The officers reasonably believed the defendant, who was not answering their questions, in a high crime area, at 6:00 a.m., who matched the

description of a robbery suspect who they reasonably believed to be armed and dangerous, and therefore the *Terry* frisk was reasonable. Since "[t]he question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize it or to pursue it," Officers Schmidt and Bishop, even **if** an alternative was available, were not acting unreasonably in failing to recognize it or pursue it. *Sanders*, 994 F.2d at 204.

Officers Schmidt and Bishop did not violate the defendant's Fourth Amendment rights when they performed a *Terry* stop and frisk on him. The stop and frisk were both reasonable under the totality of the circumstances. Even if there were other less intrusive means for the officers to protect the public, the search was still reasonable under the circumstances.

Applicant Details

First Name	**Jack**
Last Name	**Bolen**
Citizenship Status	**U. S. Citizen**
Email Address	**jb6396@nyu.edu**
Address	**Address** Street **344 McGuinness Blvd. #1L** City **Brooklyn** State/Territory **New York** Zip **11222** Country **United States**
Contact Phone Number	**3016515610**

Applicant Education

BA/BS From	**Cornell University**
Date of BA/BS	**May 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Legislation and Public Policy**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Friedman, Barry
barry.friedman@nyu.edu
212-998-6293

Issacharoff, Samuel
samuel.issacharoff@nyu.edu
212.998.6580

Bauer, Robert
rb172@nyu.edu
202.434.1602

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jack Bolen
jb6396@nyu.edu | (301) 651-5610 | 5114 Cammack Dr., Bethesda, MD 20816

June 12, 2023

The Honorable Jamar K. Walker
U.S. District Court, Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, Virginia 23510-1915 United States

Dear Judge Walker:

I write to apply for a clerkship in your chambers for the 2024 – 2025 term. I am entering my third year at NYU School of Law, where I am the Senior Articles Editor on the *Journal of Legislation and Public Policy*. I was born in Fairfax, Virginia and currently work as a summer associate at Williams & Connolly in Washington, D.C. I plan on practicing in the D.C. area after graduation.

Enclosed are my resume, law school transcript, and writing sample. I will be taking Federal Courts during my third year. The following professors will be sending letters of recommendation separately and are available for any inquiries:

- Professor Bob Bauer, robert.bauer@nyu.edu, (212) 998-6112
- Professor Barry Friedman, barry.friedman@nyu.edu, (212) 998-6293
- Professor Samuel Issacharoff, samuel.issacharoff@nyu.edu, (212) 998-6580

In addition, Judge John G. Koeltl would be pleased to discuss my candidacy based on my performance in his Constitutional Litigation Seminar. He may be reached at:

- Judge John G. Koeltl, John_G_Koeltl@nysd.uscourts.gov, (212) 805-0222

As my application materials demonstrate, I would bring experience in civil and criminal litigation to a clerkship. For two years prior to law school, I worked as a paralegal at the Manhattan District Attorney's Office. During those years, I assisted ADAs in the Rackets Bureau with all stages of criminal litigation and investigation, including by drafting search warrants, subpoenas, and legal memos. At NYU School of Law, I assisted Professor Friedman with research into the scope of Fourth Amendment protections under the third-party doctrine. My work at Williams & Connolly this summer has included helping attorneys counsel clients on multi-state class actions. I would be honored to contribute my skills to the important work of your chambers.

I am happy to provide any other information that would be useful in your evaluation of my application. Thank you for your time and consideration.

Sincerely,

Jack Bolen

Additional References

- Ricky Revesz, OIRA Administrator and Dean Emeritus of NYU School of Law, rlr2@nyu.edu, (212) 998-6185
- Jack Lienke, Regulatory Policy Director, Institute for Policy Integrity, jack.lienke@nyu.edu, (212) 998-6201
- Angie Morelli, Assistant District Attorney, Manhattan District Attorney's Office, morellia@dany.nyc.gov, (347) 697-9790

JACK BOLEN

344 McGuinness Blvd., Apt. 1L, Brooklyn, NY 11222
(301) 651-5610 • jb6396@nyu.edu

EDUCATION

New York University School of Law, New York, NY
J.D. Candidate, May 2024
Unofficial GPA: 3.70
Honors: *McKay Scholar* (Top 25% of class after four semesters)
Journal of Legislation and Public Policy, Senior Articles Editor
Dean's Scholarship
Activities: Prison Teaching Project, Teacher at Rikers Island
Regulatory Policy Clinic, Member

Cornell University, Ithaca, NY
B.A. in Government, May 2018
Honors: Dean's List
Activities: Men's Varsity Lacrosse, Starting Midfielder and Ivy League Champion

EXPERIENCE

Williams & Connolly, Washington, DC
Summer Associate, May 2023-present
Work with attorneys to develop case strategy and counsel clients on complex civil litigation matters, including class actions.

Senate Judiciary Committee, Washington, DC
Law Clerk, Senator Richard Blumenthal (D-CT), May 2022-August 2022
Researched legal issues relating to voting rights, reproductive rights, and gun violence prevention. Authored an internal memo on the constitutional right to travel post-*Dobbs*. Drafted hearing memos and witness questions. Vetted judicial nominees.

Professor Barry Friedman, New York, NY
Research Assistant, May 2022-December 2022
Researched the third-party doctrine, data trusts, and government surveillance programs. Wrote weekly memos.

Manhattan District Attorney's Office, New York, NY
Paralegal, Rackets Bureau, July 2019-May 2021
Served as the Rackets Bureau's lead analyst on multiple cryptocurrency money laundering investigations. Analyzed blockchain patterns and dark-web marketplaces to identify opioid vendors, international fraud rings, and CSAM. Assisted in the drafting and editing of search warrants, memos, and subpoenas. Interviewed victims, witnesses, and defendants.

Credit Suisse, New York, NY
Analyst, Global Credit Sales & Trading, July 2018-June 2019
Analyzed the debt of companies, sectors, and sovereigns as a member of a 40-person trading team with over $100 million in revenue in 2018. Contributed to a weekly research publication outlining trends in the US credit market.
Intern, Sales & Trading, May 2017-August 2017
Worked under the Chief Economist as part of the US Macroeconomics group.

United States Senate, Washington, DC
Intern, July 2016-August 2016
Drafted and edited memos summarizing proposed legislation. Researched issues impacting key votes and attended hearings.

ADDITIONAL INFORMATION

Enjoy oil painting, Bob Dylan, and basketball.

Name: **John P Bolen**
Print Date: **06/08/2023**
Student ID: **N18705013**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Edith Beerdsen			
Criminal Law	LAW-LW 11147	4.0	A-
Instructor: Anna N Roberts			
Torts	LAW-LW 11275	4.0	B+
Instructor: Daniel Jacob Hemel			
Procedure	LAW-LW 11650	5.0	A-
Instructor: Troy A McKenzie			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Barry E Friedman, Farhang Heydari			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Edith Beerdsen			
Legislation and the Regulatory State	LAW-LW 10925	4.0	A-
Instructor: Samuel J Rascoff			
Contracts	LAW-LW 11672	4.0	A
Instructor: Clayton P Gillette			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Barry E Friedman, Farhang Heydari			
Criminal Procedure: Police Practices	LAW-LW 12697	4.0	B+
Instructor: Barry E Friedman			

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Regulatory Policy Clinic Seminar	LAW-LW 10105	2.0	A
Instructor: Richard L Revesz, Jack Henry Lienke			
The Law of Democracy	LAW-LW 10170	4.0	A
Instructor: Samuel Issacharoff, Richard H Pildes			
Regulatory Policy Clinic	LAW-LW 11029	3.0	A
Instructor: Richard L Revesz, Jack Henry Lienke			
Constitutional Law	LAW-LW 11702	4.0	A-
Instructor: Kenji Yoshino			
Research Assistant	LAW-LW 12589	2.0	CR
Summer 2022 Research Assistant			
Instructor: Barry E Friedman			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	45.0	45.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	B+
Instructor: Samuel Issacharoff, Arthur R Miller			
Constitutional Litigation Seminar	LAW-LW 10202	2.0	A
Instructor: John G Koeltl			
Evidence	LAW-LW 11607	4.0	A-
Instructor: Daniel J Capra			
After the 2022 Election: the Paths and Challenges of Political Reform Seminar	LAW-LW 12398	2.0	A
Instructor: Robert Bauer			

	AHRS	EHRS
Current	12.0	12.0
Cumulative	57.0	57.0

McKay Scholar-top 25% of students in the class after four semesters
Staff Editor - Journal of Legislation & Public Policy 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

Barry Friedman
Jacob D. Fuchsberg Professor of Law
Affiliated Professor of Politics
Director, Policing Project

40 Washington Square South, Rm. 317
New York, New York 10012-1099
Tel: (212) 998-6293
Fax: (212) 995-4030
barry.friedman@nyu.edu

Dear Judge,

I am writing on behalf of Jack Bolen, who is applying to clerk in your chambers anytime after he graduates in the Spring of 2024. Jack has been both my student and my research assistant, and I have had a good look at his capabilities. Based on my experience, I'm extremely supportive of his application.

I first met Jack in my 1L Reading Group on Big Brother Policing. We invite entering 1Ls to sign up for non-graded discussion groups. Jack worked in a prosecutor's office prior to law school, sparking his interest in data privacy and government oversight. He worked as an analyst on cryptocurrency investigations and saw close up how government was tapping into troves of privately-held data. This led to his interest in data privacy. He was an active participant – curious and thoughtful. Among a very active group of students, he stood out.

Jack was an equally great student in my 1L Criminal Procedure class. He performed well in class, though I clearly was the outlier that gave him his lowest grade in law school (a B+). I'd not give this much credit. In truth, Jack's already strong 1L grades have been on a notably sharp curve upward to the point that I doubt many students have done better than he. And, I would point out, that is in some seriously hard classes from some demanding professors. It's all very impressive.

Jack was equally impressive as my research assistant. He helped on a number of projects but the main was involves what the privacy and other constitutional implications will be of government adoption of central bank digital currency (CBDC). CBDCs are going to be the future, but it is not without concern that the government will have a ledger of the spending of each and every one of us. Jack worked on a number of projects, a central one being some groundbreaking research on data trusts—ways for the government to have access it needs to data, but not without strict controls. Jack was hard working, creative in approaches, always on time, and delivered to me a great amount of useful information.

I want to say a bit more about Jack, but first the important and expected information. He's smart. As I said, look at his grades, especially in his upper class year. But his smarts extend beyond that to clever approaches to research, and a capacious way of thinking. He's a very clear writer, as was evident in the various memos he wrote me, as well as the writing sample (a cert petition for a constitutional litigation class taught by Judge Koetl), that you will see.

Jack is an extremely hard-worker, dogged in getting to the bottom of a hard question. In truth, he just has an exuberant curiosity about and interest in the law.

There's something really special about Jack, which I would hope comes out in an interview, and certainly has been apparent working with him. I was struck by it again in reading the "clerkship questionnaire" that we ask students to fill out for us. I have read many of these – including a fair number this year alone. Jack's was a standout. He's just such a genuine person, full of love and interest for many topics around him. I was touched by reading about everything from his work teaching in the Prison Teaching Project, to his leadership as Senior Articles Editor for the Journal of Legislation and Public Policy, to—frankly—his 95 year old grandmother whom he admire. He's extremely engaging, and a great person to be around.

Jack's destined for an early career as a litigator, though he has interests in government service, both in the executive branch and working on the Hill (which he already has done). Hi current passion is voting rights and the law of democracy, not surprising for the times in which we live. He's going to be very successful at everything he does.

I strongly urge you to interview Jack. You'll like him; I surely do. And I can tell you having him work with you will be both rewarding and enjoyable.

I'd be happy to answer any further questions.

Best regards,

Barry Friedman

New York University
A private university in the public service

School of Law
Faculty of Law

40 Washington Square South
New York, NY 10012-1099
Telephone: (212) 998-6580
Facsimile: (212) 995-4590
E-mail: samuel.issacharoff@nyu.edu

Samuel Issacharoff
Reiss Professor of Constitutional Law

Dear Judge:

Jack Bolen is a dynamic, smart, energetic and engaged law student. I have had him in two large classes (Law of Democracy and Complex Litigation) and he made a forceful impression on me in both. He is a unique and subtle thinker and engages with problems at a deeper level than other students. He has a background in finance and behavioral economics that serves him well at addressing decision making under conditions of uncertainty. Both the Law of Democracy and Complex Litigation address freighted issues in domains riddled with doctrinal imprecision. All students find these areas challenging; Jack found them invigorating.

Throughout law school, Jack has developed areas of engagement that focus on public policy and the promise of law for those least capable. Much of his attention has been devoted to the topics covered in the Law of Democracy and also in his course work and writing for Prof. Bob Bauer, formerly White House counsel under President Obama. But he has also made time to go to Rikers Island to teach a law course to prisoners there. This is no easy undertaking as just getting to Rikers and passing through the levels of security chews up a significant portion of the days involved.

On a personal level, Jack is an engaging as he is in class. He was extremely well educated at Cornell, despite the time taken as a star NCAA lacrosse player. He brings an unusual level of wintellectual sophistication to discussions both inside and outside class. But what is most impressive is his effort to take on problems in their full complexity rather than search for a simpler, incomplete path out of the issues.

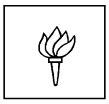
Jack will be going to Williams & Connelly this summer. This appeals to his deep interest in the high levels of litigation and the workings of the courts. He may well start off there, and certainly that firm does as great a job of training their associates as any. Nonetheless, I see him as heading into government service, as exemplified by his work over 1L summer for Senator Blumenthal. If he goes the route of the legislative branch, he will readily win people over with a winning demeanor and a ready smile.

In my opinion, Jack would be a first-rate law clerk. All the attributes that make him a successful law student will, in my view, allow him to perform admirably as a judicial clerk as well.

Please feel free to contact me if there is any further information I might provide.

Sincerely,

Samuel Issacharoff



New York University
A private university in the public service

School of Law

40 Washington Square South, Room 425
New York, New York 10012-1099
Telephone: (212) 998-6612
E-mail: robert.bauer@nyu.edu

Bob Bauer
Distinguished Scholar in Residence and Senior Lecturer
Co-Director of the Legislative and Regulatory Process Clinic

«DateForLetter»

RE: «Student»

Your Honor:

I am very pleased to write this letter of recommendation for Jack Bolen for a position as clerk in your chambers. Jack is an outstanding student, among the very best that I have ever had the privilege to teach. I have no doubt that he would perform splendidly in a clerkship role.

Jack was a student this spring in my seminar on political reform, which is part of the law school's offerings on topics in law and democracy. The seminar meets weekly for two hours, and students are expected to participate actively in class and, at the end of the semester, write a research paper of 20 to 25 pages on an approved topic. The course covers a wide range of issues in law and democracy, including campaign finance, redistricting, voting rights, lobbying reform, and alternate voting modes, such as ranked choice voting.

I had not had the occasion to work with Jack previously. He impressed immediately.

Jack is one of those students who improve the overall discussion of the class by the tone, close attention to relevance, and care with which he makes his contributions. He is exceptionally thoughtful, and there is evident in his remarks thorough preparation for the class and deep engagement with the subject matter.

Jack also displays keen intellectual curiosity. He listens to what other students have to say and asks useful follow-up questions in the course of conversation. In that respect, and not only in sketching out positions of his own, he enriches the conversation.

And Jack writes very well. He prepared an outstanding paper, which I justly graded an "A," on the topic of state legislative measures to wrest municipal and local control over education systems, law enforcement, and judicial process. He carefully and crisply analyzed the various legal theories underline potential (and pending) challenges. Within the space available, he provided insight into issues of expanding importance in the field of the law and democracy.

During the semester, Jack took the time to visit over office hours to follow up with me on class discussions. Sometimes in office hours students will use the opportunity to make sure they understand aspects of the last class conversation, to check in on what they might expect from exams, and to explore avenues for career development after graduation. All of that is fine. But Jack also displayed a genuine interest in just taking to the next level the lines of inquiry that we had pursued in class. I enjoyed those conversations as much as I hope Jack gained from them.

Jack's transcript tells the tale of a student who has excelled in the demanding coursework at NYU Law. And any one who has worked with Jack will appreciate that this performance reflects not just intellectual ability but a full commitment to the career path in the law that he has chosen.

I can enthusiastically commend Jack for a clerkship position as your chambers.

Should you have any questions or wish to discuss Jack's qualifications in any additional detail, I am available for a call at your convenience.

Very truly yours,

Bob Bauer

Writing Sample

Below is a petition for a writ of certiorari I wrote in Judge Koeltl's Constitutional Litigation Seminar. Each student was assigned the same case, 46 F.4th 1075, and instructed to draft a petition for a writ of certiorari. There was no further guidance or limitation. The table of contents and table of authorities are omitted. Judge Koeltl provided general feedback after submission, but none of his feedback has been incorporated into this document. This writing sample has not been reviewed or edited by anyone else.

No.

In the Supreme Court of the United States

SAN JOSE SCHOOL DISTRICT, PETITIONER

v.

FELLOWSHIP OF CHRISTIAN ATHLETES AND FELLOWSHIP OF CHRISTIAN ATHLETES OF PIONEER HIGH SCHOOL, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JACK BOLEN
Counsel of Record
NYU SCHOOL OF LAW
40 Washington Square S.
New York, NY 10012
(301) 651-5610
jb6396@nyu.edu

QUESTION PRESENTED

Whether First Amendment claims are categorically exempt from the ordinary burdens of 1) establishing Article III standing, and 2) proving likelihood of success on the merits, such that hearsay evidence of speculative injury is sufficient to obtain injunctive relief.

PARTIES TO THE PROCEEDING

Petitioner, and defendant-appellant below, is San Jose Unified School District Board of Education.

Respondents, and plaintiffs-appellees below, are Fellowship of Christian Athletes and Fellowship of Christian Athletes of Pioneer High School.

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 46 F.4th 1075. The opinion of the United States District Court for the Northern District of California denying petitioner's motion for a preliminary injunction is unreported, but available at 2022 WL 1786574.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was issued on August 29, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case concerns critical questions that are the subject of conflict among federal courts of appeals: whether First Amendment claims seeking injunctive relief should be held to a lower standard for 1) establishing Article III standing, and 2) proving likelihood of success on the merits. Respondents sought prospective injunctive relief on the ground that petitioner violated the Free Exercise Clause of the First Amendment by selectively enforcing its non-discrimination policy. In finding that respondents were entitled to injunctive relief, the Ninth Circuit declined to apply the usual standard for evaluating Article III standing and likelihood of success on the merits. Instead, the Ninth Circuit employed a more lenient test.

The Ninth Circuit majority's analysis started from the premise that First Amendment suits are

categorically different. The majority asserted that First Amendment claims are subject to lower burdens of proof for establishing Article III standing and proving likelihood of success on the merits. In evaluating standing, the majority stated: "[w]hen the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 46 F.4th 1075, 1090 (9th Cir. 2022). The majority also applied a more lenient standard in evaluating respondents' likelihood of success on the merits. Whereas the normal injunctive relief standard requires the party seeking injunctive relief to make a "clear showing" that it is "likely to succeed," *Winter v. NRDC, Inc.*, 555 U.S. 7, 22, 24 (2008), the majority applied a standard whereby "the existence of a colorable First Amendment claim" is "sufficient to merit the grant of relief." 46 F.4th at 1098.

The proper standard for evaluating First Amendment claims seeking injunctive relief is the subject of widespread confusion. Despite this Court's firm approach to the standing inquiry in *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), several lower courts continue to employ a more lenient standing standard to First Amendment claims. And despite this Court's clear articulation of the four injunctive relief factors in *Winter*, in which this Court held that injunctive relief was an "extraordinary remedy" that required a "clear showing" of likely success on the merits, 555 U.S. at 22, several lower courts have found that a colorable claim suffices when the First Amendment is invoked.

In evaluating standing in the context of First Amendment claims, the lower courts are sharply divided over how to reconcile *Clapper*, which articulated the proper inquiry for Article III standing,

with *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984), and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), which concerned only prudential standing. The D.C. Circuit, Second Circuit, and Fifth Circuit properly recognize that the prudential standing inquiry and Article III standing inquiry are distinct: First Amendment claims are never exempt from the full burden of establishing Article III standing, as outlined in *Clapper*. Instead, it is only *prudential* standing requirements that may be relaxed for certain species of First Amendment claims. "Plaintiffs repeatedly assert that the requirements of standing are relaxed in the First Amendment context. That is true, but only as relating to the various court-imposed prudential requirements of standing." *Seals v. McBee*, 898 F.3d 587, 591 (5th Cir. 2018). "Under the [First Amendment] overbreadth doctrine, the prudential limitations against third party standing are relaxed . . . . Even so, the reviewing court must consider whether the third party has sufficient injury-in-fact to satisfy the Article III case-or-controversy requirement." *United States v. Smith*, 945 F.3d 729, 736 (2d Cir. 2019) (internal quotation marks and citation omitted).

The Ninth Circuit and several other courts of appeals conflate prudential standing and Article III standing. Failing to see the distinction drawn by *Clapper*, they have turned *Munson* and *Broadrick*'s prudential overbreadth doctrine into a broad First Amendment rule. The mistake is glaring and pervasive: "[t]he First Amendment standing inquiry is 'lenient' and 'forgiving.' This leniency 'manifests itself most commonly in the doctrine's first element: injury-in-fact.'" *Turtle Island Foods v. Thompson*, 992 F.3d 694, 699-700 (8th Cir. 2021) (internal citations omitted). "The 'unique standing considerations' in the First Amendment context 'tilt dramatically toward a finding of standing.'" *Tingley v. Ferguson*, 47 F.4th

1055, 1066-67 (9th Cir. 2022) (internal citations omitted). "The Supreme Court of the United States has explained that standing requirements are somewhat relaxed in First Amendment cases." *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013). "The First Amendment context creates unique interests that lead us to apply the standing requirements somewhat more leniently." *Peck v. McCann*, 43 F.4th 1116, 1129 (10th Cir. 2022).

The lower courts are similarly divided over the proper standard for evaluating the substantive injunctive relief factors in the context of First Amendment claims. *Winter* articulated the proper burden of proof at the injunctive relief stage: the moving party bears the burden of making a "clear showing." *Winter*, 555 U.S. at 28. And, critically, the burden applies with full force to the first prong of *Winter*'s four-pronged test: "likelihood of success on the merits." *Id.* at 25. Yet "the circuits' varying formulations . . . are described differently, often reflecting pre-*Winter* formulations." 13 Moore's Federal Practice, Civil § 65.22.

The Fourth Circuit and Tenth Circuit properly apply the *Winter* factors. "The Supreme Court has held that the irreparable harm must be 'likely,' not merely possible." *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 270 (4th Cir. 2018) (quoting *Winter*). "Under *Winter*'s rationale, any modified test which relaxes one of the prongs for preliminary relief and thus deviates from the standard test is impermissible." *Dine Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016).

The Ninth Circuit and several other courts of appeals misapply the *Winter* factors in evaluating First Amendment claims. The error stems from an incorrect interpretation of this Court's holdings in *Ashcroft v. ACLU*, 542 U.S. 656 (2004), and *Gonzales*

v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006). As with the standing inquiry, these courts misread a rule about a particular subset of First Amendment cases as a rule that applies to all First Amendment cases. *Ashcroft* and *Gonzales* merely repeated the well-established rule that the party who bears the burden of persuasion at trial bears the burden of persuasion at the injunctive relief stage. In both of those cases, the government ultimately bore the burden at trial. *Ashcroft* concerned a facial challenge to a content-based restriction that triggered strict scrutiny, and *Gonzales* concerned a statute with a burden-shifting provision. Because the government bore the burden at trial in those cases, the movant did not need to make the customary showing that it was likely to succeed.

But several courts of appeals, including the Ninth Circuit, have read these precedents as holding that movants enjoy relaxed standards for obtaining injunctive relief in all First Amendment cases, not just the narrow category of cases in which the government would bear the burden at trial. *See, e.g.*, *Doe v. Governor of Pa.*, 790 F. App'x 398, 403 (3d Cir. 2019) ("Because First Amendment cases require the government . . . to justify speech-regulating laws at trial, the burden also rests with the government at the preliminary injunction stage. So long as the plaintiff makes a colorable First Amendment claim, the government must justify its law"); *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 962 (9th Cir. 2002) ("Under the law of the Ninth Circuit . . . when the harmed claimed is a serious infringement on core expressive freedoms, a plaintiff is entitled to an injunction even on a lesser showing of meritoriousness."). This diluted standard of "lesser meritoriousness" is the standard that the Ninth Circuit applied in the instant case: "[a] party seeking

preliminary injunctive relief in a First Amendment context can . . . merit the grant of relief by demonstrating the existence of a colorable First Amendment Claim." 46 F.4th at 1098.

The Ninth Circuit's decision should not stand. It rests on improper relaxation of the Article III standing requirements and the *Winter* factors. The application of these standards deepens a rift within the lower courts by conflicting with the standards of the D.C. Circuit, Second Circuit, Fourth Circuit, Fifth Circuit, and Tenth Circuit. Moreover, the standard applied by the Ninth Circuit cannot be reconciled with this Court's decisions in *Clapper* and *Winter*. Finding standing based on hearsay evidence of a speculative injury is contrary to black-letter Article III principles. And allowing respondents to obtain injunctive relief based on the mere showing of a colorable claim flies in the face of *Winter*'s description of injunctive relief as an "extraordinary remedy." 555 U.S. at 22. This issue implicates thousands of non-discrimination policies at the local, state, and federal level. Allowing the Ninth Circuit's ruling to stand would enable any plaintiff who utters the words "First Amendment" to preemptively enjoin the enforcement of a non-discrimination policy. Further review is warranted.

A. Factual Background

This case arises out of a school district's enforcement of a boilerplate non-discrimination policy. In May 2019, petitioner San Jose Unified School District (the "District") found the chapter of the Fellowship of Christian Athletes ("FCA") operating at one of District's schools, Pioneer High School ("Pioneer"), to be in violation of the District's non-discrimination policy. 46 F.4th at 1084. Petitioner consequently rescinded its recognition of FCA as an officially sponsored student club. *Id*.

The relevant non-discrimination policy stated:

> All district programs and activities within a school under the jurisdiction of the superintendent of the school district shall be free from discrimination, including harassment, with respect to the actual or perceived ethnic group, religion, gender, gender identity, gender expression, color, race, ancestry, national origin, and physical or mental disability, age or sexual orientation.

Id. at 1104.

Petitioner determined that FCA's bylaws conflicted with the non-discrimination policy. FCA required its student leaders to sign a pledge that said, in relevant part:

> "[W]e believe that marriage is exclusively the union of one man and one woman" and "[t]he Bible is clear in teaching on sexual sin including sex outside of marriage and homosexual acts. Neither heterosexual sex outside of marriage nor any homosexual act constitute an alternative lifestyle acceptable to God."

Id. at 1082-83.

Petitioner's rescission of official recognition did not prevent FCA from continuing to operate. *See id.* at 1085. Rather, FCA was merely exempted from special benefits such as priority access to meeting space and access to school-provided bank accounts. *Id.* at 1089. Petitioner allowed FCA to continue operating on District campuses, and FCA continued to operate on District campuses during the 2019-20 school year, including at Pioneer. *Id.* at 1084.

Because of the COVID-19 pandemic, student clubs did not operate on District campuses between spring 2020 and April 2021. *Id.* at 1085. Still, Pioneer granted modified conditional approval to all student clubs,

including Pioneer FCA, for the 2020-21 school year. *Id.*

Prior to the 2021-22 school year, petitioner adopted a new non-discrimination policy known as the "all-comers policy." *Id.* at 1087. Any club seeking official recognition was required to sign the all-comers policy. *Id.* The policy states that clubs must:

> Allow any currently enrolled student of the school to participate in, become a member of, and seek or hold leadership positions in the organization, regardless of his or her status or beliefs.

Id.

Student clubs must reapply for official recognition each fall. *Id.* at 1082. FCA did not apply for official recognition during the 2021-22 school year. *Id.* at 1087. One of the clubs that did apply for recognition, the Senior Women Club, modified their copy of the "all-comers policy" before signing it to include a handwritten note stating that only "students who are seniors and identify as female" could become members. *Id.* at 1095. The Senior Women Club was granted recognition for the 2021-22 school year. *Id.*

Because student clubs must reapply for recognition each fall, FCA's request for reinstatement is relevant only if an FCA student leader plans to apply for official recognition in the future. In September 2021, FCA's Bay Area regional director, Rigoberto Lopez, stated that he knew of a student at Pioneer who planned to apply for the 2021-22 school year. *Id.* at 1090 (Christen, J., dissenting). But no student ultimately applied. *Id.* In May 2022, Lopez declared that he knew of other Pioneer students who planned to lead Pioneer FCA during the 2022-23 school year. *Id.* Lopez does not claim that any student has explicitly voiced an intention to apply for recognition, but Lopez predicts that students would apply if injunctive relief were granted. *Id.*

B. Procedural History

1. On April 22, 2020, FCA National filed suit against the District and several of its officials. *Id.* at 1106. It was later joined by Pioneer FCA. *Id.* at 1085. In the operative complaint, filed in July 2021, respondents alleged that the "all-comers policy" was both facially discriminatory and selectively enforced. *Id.* at 1087. Respondents alleged that petitioner violated their rights to: (1) equal access to extracurricular school clubs under the Equal Access Act (EAA), 20 U.S.C. §§ 4071 et seq.; (2) Free Speech, Expressive Association, and Free Exercise of Religion under the First Amendment; and (3) Equal Protection under the Fourteenth Amendment. *Id.* at 1085. Respondents sought damages and a preliminary injunction "requiring Defendants to restore recognition to student chapters affiliated" with FCA National, including Pioneer FCA, "as official[ly] approved student clubs." *Id.* at 1086. The opinion of the Ninth Circuit concerned only the motion for a preliminary injunction.

The United States District Court for the Northern District of California denied respondents' motion for a preliminary injunction. *See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, No. 20-CV-02798, 2022 WL 1786574 (N.D. Cal. June 1, 2022). Judge Gilliam found that petitioner's all-comers policy was facially neutral. *Id.* at 7. With regard to the selective enforcement allegation, Judge Gilliam held that respondents failed to prove that they were likely to succeed on the merits and thus were not entitled to a preliminary injunction. *Id.*

2. A divided panel of the United States Court of Appeals for the Ninth Circuit reversed. 46 F.4th 1075. The majority opinion, written by Judge Lee and joined by Judge Forrest, directed the district court to enter an order reinstating FCA as an official student club. *Id.*

First, the majority found that respondents had established Article III standing. *See id.* at 1088-91. The majority arrived at this conclusion from the premise that the Article III standing inquiry is severely relaxed in the context of the First Amendment. The majority stated, "[w]hen the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." *Id.* at 1090. The majority found that Lopez's predictions about Pioneer students' intentions to apply for membership during the 2022-23 school year were sufficient to establish imminent injury, noting that "hearsay evidence may be considered when deciding whether to issue a preliminary injunction." *Id.*

Second, the majority held that respondents had made the necessary showing on the merits. *See id.* at 1091-99. In evaluating the four injunctive relief factors, the majority again started from the premise that First Amendment claims should be held to a lesser standard. Whereas the typical applicant for injunctive relief must establish that its claim is "likely" to succeed, the majority stated that "a party seeking preliminary injunctive relief in a First Amendment context can . . . merit the grant of relief by demonstrating the existence of a colorable First Amendment claim." *Id.* at 1098.

Judge Christen dissented. In her view, respondents failed to establish Article III standing. *Id.* at 1103-1117. She stated, "[t]he unavoidable reality is that the District's nondiscrimination policy will not harm FCA if no student intends to apply for [official] recognition." *Id.* at 1103. Judge Christen remarked that the majority's reliance upon Lopez's hearsay predictions fell "woefully short" of the "concrete plans" and "firm intentions" standard this Court established in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Summers v. Earth Island Inst.*, 555 U.S. 488

(2009). *Id.* at 1115. Judge Christen stated, "[t]he absence of a concrete plan or firm intentions to take action that will trigger the challenged conduct renders any future injury too speculative for Article III purposes." *Id.* at 1113 (internal citation omitted).

REASONS FOR GRANTING THE PETITION

A. There Is Conflict Over Whether First Amendment Claims Must Satisfy The Ordinary Standing Requirements

The federal courts of appeals are divided over whether First Amendment claims must meet the traditional burdens of Article III standing. This disagreement reflects widespread confusion over the implications of this Court's decisions in *Broadrick* and *Munson*. The split is mature and entrenched; every circuit has analyzed Article III standing requirements in the context of First Amendment claims for injunctive relief since *Clapper*. There is no reason to delay articulating the proper standard.

In the opinion below, the Ninth Circuit majority departed from normal Article III principles and applied a diluted standing test. The majority's rationale for relaxing the Article III standing requirements was transparent: "[w]hen the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." 46 F.4th at 1090.

This approach was not an aberration. The Ninth Circuit regularly relaxes the Article III test when evaluating First Amendment claims. *See, e.g.*, *Ariz. Right to Life Pol. Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003); *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010); *Tingley v. Ferguson*, 47 F.4th 1055, 1066-67 (9th Cir. 2022). The Fourth, Sixth, Eighth, and Tenth Circuits do the same. *See Edgar v. Haines*, 2 F.4th 298, 310 (4th Cir. 2021); *Faith Baptist*

Church v. Waterford Twp., 522 F. App'x 322, 330 (6th Cir. 2013); *Dakotans For Health v. Noem*, 52 F.4th 381, 384 (8th Cir. 2022); *Peck v. McCann*, 43 F.4th 1116, 1129 (10th Cir. 2022).

Each of these courts has continued to apply a diluted Article III standard to First Amendment claims post-*Clapper*. *Clapper*, which addressed a First Amendment claim for prospective injunctive relief, should have resolved any confusion about whether a relaxed approach to First Amendment standing was proper: "[r]elaxation of standing requirements is directly related to the expansion of judicial power . . . . To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" 568 U.S. at 409 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010)). The Ninth Circuit and other lower courts are either overlooking *Clapper*'s articulation of the proper standard or are unable to reconcile *Clapper* with *Broadrick* and *Munson*.

Several lower courts have misinterpreted *Broadrick* and *Munson* as invitations to lessen the burden of Article III standing in the context of First Amendment claims. But the modified standing inquiry articulated in *Broadrick* and *Munson* applied only to prudential standing, not Article III standing. "This Court has relaxed the *prudential*-standing limitation when [particular] concerns are present . . . . In such a situation, the Court considers whether the third party has sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement, and whether, as a prudential matter, the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal." *Munson*, 467 U.S. at 956 (emphasis added). Further, *Munson*'s articulation of a more lenient prudential standing

inquiry applied only to a particular subset of First Amendment claims—facial overbreadth challenges. "Application of the overbreadth doctrine is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613.

A misreading of *Munson* and *Broadrick* has infected several lower courts' Article III standing doctrines. Critically, the confusion has undermined these courts' application of the first Article III standing requirement: injury-in-fact. These courts have found speculative injury sufficient to satisfy the injury-in-fact requirement. "We have held that 'a chilling of the exercise of First Amendment rights is, itself, a constitutionally sufficient injury.'" *Libertarian Party of Los Angeles Cnty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013) (internal citation omitted). "The First Amendment standing inquiry is 'lenient' and 'forgiving.' This leniency 'manifests itself most commonly in the doctrine's first element: injury-in-fact.'" *SPC v. Thompson*, 992 F.3d 694, 699-700 (8th Cir. 2021) (internal citations omitted).

B. There Is Conflict Over Whether First Amendment Claims Must Meet The Ordinary Burden For Injunctive Relief

The federal courts of appeals are similarly at odds over whether First Amendment claims are categorically subject to a diluted application of the four *Winter* factors necessary to obtain injunctive relief. This disagreement is the product of confusion about this Court's decisions in *Ashcroft* and *Gonzales*. Like the divide concerning Article III standing, this confusion has been percolating for over a decade.

In the opinion below, the Ninth Circuit moved First Amendment claims for injunctive relief onto their own island—one unencumbered by the traditional

burden of the *Winter* factors. Whereas *Winter* described injunctive relief as "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief," 555 U.S. at 22 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (per curiam)), the opinion below stated, "a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim." 46 F.4th at 1098 (internal quotation marks and citation omitted).

The Ninth Circuit's uneven application of *Winter* to First Amendment claims is replicated in other lower courts. The Third, Fifth, and Sixth Circuits have also endorsed a separate, less demanding standard for First Amendment claims. *See Reilly v. City of Harrisburg*, 858 F.3d 173, 180 (3d Cir. 2017); *Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535, 539 (5th Cir. 2013); *Cnty. Sec. Agency v. Ohio Dep't of Comm.*, 296 F.3d 477, 485 (6th Cir. 2002).

The divide over the proper standard begins with confusion over which party bears the burden of persuasion. The ordinary rule is undisputed: the burden is on the movant. *See Mazurek*, 520 U.S. at 972 (1997) (citing C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, pp. 129-130 (2d ed. 1995)). But when the First Amendment is implicated, some lower courts stray off course. Under the well-established rule that "the burdens at the preliminary injunction stage track the burdens at trial," *Gonzales*, 546 U.S. at 429, the government bears the burden of persuasion at the preliminary injunction stage for the narrow category of claims for which it would bear the burden at trial. In the First Amendment context, this includes claims that challenge content-based restrictions, *see Ashcroft*, and claims invoking

statutory provisions that shift the burden to the government, *see Gonzales*.

Some lower courts have misinterpreted these exceptions as a burden-shifting rule applicable to all First Amendment claims. The Third Circuit provides a clean summary of this mistaken approach: "[b]ecause First Amendment cases require the government—through either strict or intermediate scrutiny—to justify speech-regulating laws at trial, the burden also rests with the government at the preliminary injunction stage." *Doe v. Governor of Pa.*, 790 F. App'x 398, 403 (3d Cir. 2019). But this approach flows from a patently false premise: not all First Amendment cases trigger strict or intermediate scrutiny. *See, e.g.*, *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661 (2010); *Emp't Div. v. Smith*, 494 U.S. 872 (1990).

Though the Ninth Circuit has not explicitly endorsed the categorical burden-shifting approach of the Third Circuit, confusion over the burden of persuasion has colored its analysis of the proper burden of proof. In the First Amendment context, lower courts mangle the *Winter* inquiry in two different ways: 1) by applying a watered-down version of the four elements, *see Cal. Chamber of Comm. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 482 (9th Cir. 2022), or 2) by collapsing the four elements into one, *see Cnty. Sec. Agency*, 296 F.3d at 485. The Ninth Circuit's substitution of the "colorable claim" standard, 46 F.4th at 1098, in place of *Winter*'s "likely to succeed on the merits" standard, 555 U.S. at 22, is a notable example.

C. The Ninth Circuit Is Wrong

The Ninth Circuit's relaxed Article III standing inquiry contradicts this Court's precedents. *Lujan* made clear that speculation about the intentions of

third parties is insufficient to establish Article III standing. And *Clapper* affirmed that *Lujan*'s prospective injury-in-fact standard applies with full force to First Amendment claims. "We have repeatedly reiterated that 'threatened injury must be *certainly* impending to constitute injury in fact,' and that '[a]llegations of possible future injury' are not sufficient. 568 U.S. at 409 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158).

In this case, the wrong approach led to the wrong result. Respondents' theory of Article III standing rests upon Lopez's hearsay prediction that Pioneer students will apply for recognition in the coming school year, even though no student applied for recognition during the previous school year. But the chain of events necessary to establish impending injury does not end there. Respondents bring a selective enforcement claim seeking *prospective* injunctive relief. A selective enforcement injury will occur in the future only if: 1) Pioneer FCA students apply for recognition; 2) Pioneer FCA is denied recognition; 3) other clubs that maintain discriminatory policies apply for recognition; and 4) those other clubs are granted recognition. In the words of *Clapper*, "[a] highly attenuated chain of possibilities . . . does not satisfy the requirement that threatened injury must be certainly impending." 568 U.S. at 410.

Respondents fall back on an alternative theory of organizational standing that fares no better. The Ninth Circuit majority held that FCA National possessed organizational standing because it "had to devote significant time and resources to assist its student members because of derecognition." 46 F.4th at 1089. But as Judge Christen's dissent points out, this theory of standing "conflates plaintiffs' claims for past and future injury." *Id.* at 1108. The only claims relevant to a motion seeking injunctive relief are those

implicating future injury. FCA National's past expenses say nothing about future harm. Further, a preliminary injunction cannot be granted unless an applicant shows that an "irreparable" injury will result in the absence of such relief. 555 U.S. at 18. FCA National's proffered injuries fail to satisfy this requirement. "Lost income or other economic loss that is calculable and compensable by monetary damages ordinarily will not be considered an irreparable injury." 13 Moore's Federal Practice, Civil § 65.22.

The Ninth Circuit's relaxed application of *Winter*'s likelihood-of-success requirement similarly contravenes this Court's guidance. This Court established that a party seeking a preliminary injunction must make a "clear showing" that it is entitled to relief. 555 U.S. at 22. Subsequent opinions should dispel any confusion over whether this standard applies to First Amendment claims. *See Ramirez v. Collier*, 142 S. Ct. 1264, 1275 (2022); *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018). A "clear showing" of the four *Winter* factors necessarily includes a clear showing that movant is likely to succeed on the merits. But the majority of the Ninth Circuit found that a "colorable claim" was a fine substitute for a "clear showing." 46 F.4th at 1098. The Ninth Circuit's approach cannot be reconciled with this Court's view of injunctive relief as an "extraordinary remedy." 555 U.S. at 22.

D. This Case Presents An Issue Of Exceptional Legal And Practical Importance

If the Ninth Circuit's decision is allowed to stand, its fallout could not be contained. Non-discrimination policies are ubiquitous. There are nearly 100,000 public schools in the United States.[1]

[1] NAT'L CTR. FOR EDUC. STATS., *Digest of Education Statistics*, https://nces.ed.gov/fastfacts/display.asp?id=84 (last visited June 7, 2023).

California alone has 1,018 school districts.[2] The Ninth Circuit's standard encourages organizations from all over the country to sue to enjoin local school policies they dislike, no matter how tenuous the connection.

Civic institutions have come to rely on non-discrimination policies for a reason: this Court endorsed them. *See Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661 (2010) (upholding a non-discrimination policy identical to the all-comers policy that respondents challenge). Turning a blind eye to the Ninth Circuit's injunction would usher in a new wave of challenges that call the stability of this Court's precedent into question.

Schools are not the only institutions that would bear the consequences of the Ninth Circuit's standard. Relaxing the requirements of Article III standing affects every First Amendment case or controversy brought before a federal court. The decision below sends a signal to prospective plaintiffs that the only requirement for obtaining an injunction is invoking the magic words "First Amendment." The Ninth Circuit's standard would turn Article III's case or controversy requirement into an empty formality.

[2] CAL. DEP'T OF EDUC., *Fingertip Facts on Education in California*, https://www.cde.ca.gov/ds/ad/ceffingertipfacts.asp (last updated Mar. 15, 2023).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JACK BOLEN
Counsel of Record
NYU SCHOOL OF LAW
40 Washington Square S.
New York, NY 10012
(301) 651-5610
jb6396@nyu.edu

Applicant Details

First Name	**Michelle**
Middle Initial	**E**
Last Name	**Briney**
Citizenship Status	**U. S. Citizen**
Email Address	**meb392@cornell.edu**
Address	**Address** **Street** **107 E State Street** **City** **Ithaca** **State/Territory** **New York** **Zip** **14850** **Country** **United States**
Contact Phone Number	**(203)228-8990**

Applicant Education

BA/BS From	**Fordham University**
Date of BA/BS	**May 2018**
JD/LLB From	**Cornell Law School** **http://www.lawschool.cornell.edu**
Date of JD/LLB	**May 11, 2024**
Class Rank	**10%**
Law Review/Journal	**Yes**
Journal(s)	**LII Supreme Court Bulletin**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Rossi**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Blume, John
jb94@cornell.edu
607-255-1030
Donovan, Margaret
margaret.donovan@usdoj.gov
2039019660
Fraser, Hilary
htf4@cornell.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

107 E. State St., Apt. 413
Ithaca, NY 14850
(203) 228-8990
meb392@cornell.edu

Tuesday, June 27, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a rising third-year law student at Cornell Law School, and am writing to apply for a clerkship in your chambers for the 2024-2025 term. My resume, transcript, law school grading policy, and writing sample are included in my application, along with letters of recommendation from Cornell professors John Blume and Hilary Fraser and AUSA Margaret Donovan, my internship supervisor last summer at the U.S. Attorney's Office for the District of Connecticut.

Please contact me at the above phone number or email address if you require additional information. Thank you for your time and consideration!

Sincerely,

Michelle Briney

Enclosures

MICHELLE E. BRINEY

107 E State Street, Apt. 413, Ithaca, NY 14850 • 203-228-8990 • meb392@cornell.edu

EDUCATION

Cornell Law School — Ithaca, NY
Juris Doctor anticipated — May 2024
GPA: 3.840 (Top 10%)
Honors: Frederic H. Weisberg Prize in Constitutional Law; Dean's List (4 semesters);
CALI Awards for Property, Professional Responsibility and Federal Courts
Activities: LII Supreme Court Bulletin, *Managing Editor*
Rossi Moot Court Competition, *Quarterfinalist*; Langfan First-Year Moot Court Competition, *Round of 32*
International Refugee Assistance Project; Public Interest Law Union; Women's Law Coalition

Fordham University — Bronx, NY
Bachelor of Arts in History and Middle East Studies with Minor in Biology, *summa cum laude* — May 2018
GPA: 3.885
Honors: Phi Beta Kappa; Phi Kappa Phi; Phi Alpha Theta (History Honors Society)
Dean's List, First and Second Honors; Class of 1915 Prize (best debate speaker in Senior class)
Activities: Fordham Debate Society, Ranked 8th Novice Speaker at 2016 Stanford Debate Tournament
Study Abroad for Area and Arab Languages in Amman, Jordan

EXPERIENCE

National Archives Office of General Counsel — College Park, MD
Summer Law Clerk — Summer 2023
- Researched FOIA and FTCA claims for attorneys in the Archives' Office of General Counsel

Capital Punishment Clinic, Cornell Law School — Ithaca, NY
Student Attorney — Spring 2023
- Wrote portion of traverse submitted in support of client's federal habeas petition

Afghan Assistance Clinic, Cornell Law School — Ithaca, NY
Student Attorney — Fall 2022
- Assisted client in filing online I-589 Application for Asylum, including holding weekly meetings
- Researched Afghanistan country conditions, client's grounds for asylum, and legal precedent
- Wrote legal memo in support of client's application for asylum

U.S Attorney's Office, District of Connecticut — New Haven, CT
Summer Legal Intern — May 2022–August 2022
- Researched and wrote memoranda on civil and criminal issues for Assistant U.S. Attorneys (AUSAs)
- Observed trials, proffer session, sentencing hearings and bond hearings led by AUSAs
- Appeared in court at sentencing hearing

Barnes & Noble — Waterbury, CT
Bookseller — November 2018–August 2021
- Assisted customers and routinely sold highest number of memberships per week
- Taught newer coworkers how to use cash registers and the store's lookup systems
- Reorganized and maintained history section to encourage browsing and increase findability

Connecticut Institute for Refugees and Immigrants — Hartford, CT
Volunteer — August 2018–March 2020
- Helped attorney and staff assist immigrant clients by organizing files and finding country condition information
- Wrote close file letters, cover letters, and responses to clients
- Received a CIRI Volunteer of the Year award for 2018

INTERESTS

Books by Terry Pratchett, Steven Sondheim musicals, Tang Soo Do karate (black belt)

Cornell Law School - Grade Report - 06/03/2023

Michelle E Briney

JD, Class of 2024

Course	Title	Instructor(s)	Credits	Grade	
Fall 2021 (8/24/2021 - 12/3/2021)					
LAW 5001.2	Civil Procedure	Gardner	3.0	A	
LAW 5021.2	Constitutional Law	Rana	4.0	A	CALI
LAW 5041.3	Contracts	Rachlinski	4.0	A-	
LAW 5081.6	Lawyering	Stanley	2.0	B+	
LAW 5151.4	Torts	Schwab	3.0	A	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	3.8337
Cumulative	16.0	16.0	16.0	16.0	16.0	16.0	3.8337

^ Dean's List

Spring 2022 (1/18/2022 - 5/2/2022)					
LAW 5001.3	Civil Procedure	Reinert	3.0	A-	
LAW 5061.3	Criminal Law	Sood	3.0	A	
LAW 5081.6	Lawyering	Stanley	2.0	B+	
LAW 5121.3	Property	Underkuffler	4.0	A	CALI
LAW 6011.1	Administrative Law	Rachlinski	3.0	A-	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	15.0	15.0	3.7786
Cumulative	31.0	31.0	31.0	31.0	31.0	31.0	3.8070

^ Dean's List

Fall 2022 (8/22/2022 - 12/16/2022)					
LAW 6131.2	Business Organizations	Charles Whitehead	4.0	A-	
LAW 6263.1	Criminal Procedure - Adjudication	Blume	3.0	A	
LAW 6641.1	Professional Responsibility	Wendel	3.0	A+	CALI
LAW 7259.101	Faculty At Home Seminar: Constitutional Law in the News	Johnson	1.0	SX	
LAW 7790.301	Afghanistan Assistance Clinic I	Fraser/Sherman	4.0	A	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	15.0	15.0	15.0	15.0	14.0	14.0	3.9764
Cumulative	46.0	46.0	46.0	46.0	45.0	45.0	3.8597

^ Dean's List

Spring 2023 (1/23/2023 - 5/16/2023)					
LAW 6203.1	First Amendment: Speech and Press Clauses	Tebbe	3.0	B+	
LAW 6401.1	Evidence	K. Weyble	4.0	A	
LAW 6431.1	Federal Courts	Gardner	4.0	A	CALI
LAW 6437.1	Federal Practice and Procedure	Nathan	1.0	SX	
LAW 7811.301	Capital Punishment Clinic 1	Blume/Freedman/Knight	4.0	A-	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	15.0	15.0	3.7780
Cumulative	62.0	62.0	62.0	62.0	60.0	60.0	3.8393

^ Dean's List

Total Hours Earned: 62

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am the Samuel F. Leibowitz Professor of Trial Techniques at Cornell Law School and the Director of the Cornell Death Penalty Project. Michelle was a student in my Criminal Procedure class during the fall of 2022 and in the Capital Punishment Clinic during the spring 2023 semester. She also served as my Research Assistant during the spring 2023 semester. Thus I have observed her work in a variety of different contexts and, therefore, I have a good vantage point to comment on her qualifications to be a judicial clerk.

In Criminal Procedure, Michelle was one of the stars of the class. She was very active in the class discussions (in a good way), and displayed, on a number of occasions, the ability to tease apart a complex doctrinal problem. She was a joy to have in class and always moved the class discussion forward. On the final examination, she did an excellent job, and received the third highest grade (out of 90 students) and thus received an A for the course. I worked more closely with Michelle in the Capital Punishment Clinic and when she was my RA. In the clinic, Michelle was assigned to a team tasked with drafting a Traverse in a federal habeas case on behalf of a death row inmate. More specifically, Michelle was assigned to work on a claim alleging ineffective assistance of counsel for failing to develop and present evidence supporting the client's consistent assertion that the homicide was an accident and not murder. Michelle did an excellent job. Habeas corpus can be overwhelming at times for students (and lawyers), as they are required to not only analyze whether the claim was meritorious, but also whether the state court's merits' decision was objectively unreasonable. Again, her ability to analyze a set of complex legal problems and to present her analysis clearly and concisely came through. These qualities and skills will serve Michelle will as a judicial clerk. As my RA, she assisted in updating an Evidence Book that I co-author with several other professors (A Modern Approach to Evidence). She was assigned to review on the Chapters and do an initial analysis of needed updates, etc. As was true in my other experiences with Michelle, she did an excellent job. Her research was through and thoughtful and she completed all her assignments in a timely fashion.

Michelle is also very personable. She was an excellent team member in the clinic and as an RA. She is a bit quirky, but in a good way, as she realizes it and is quick to poke fun at herself in an endearing way. She will definitely get along well her co-clerks and the administrative staff in your chambers.

Michelle has an excellent overall record at Cornell, and is one of our top students. She is in the top 10% of the class, has received a number of CALI awards (including the CALI in Federal Courts, one of the most difficult classes at Cornell Law School) and the Weisberg Prize on Constitutional Law. Her excellence in the classroom is even more impressive when you take into account that she is very involved in extracurricular activities including LII Supreme Court Bulletin, Moot Court, the Women's Law Coalition, the Public Interest Law Union and the Refuge Assistance Project.

Michelle wants to clerk because she believes that not only will she have another year to hone her research and writing skills under a judge's mentorship, but also to get exposure to different areas of law in a practical way. As someone who plans on a career in public service, clerking will provide her with an opportunity to evaluate her career options.

I sum, I give Michelle my highest recommendation. I have no doubt that she has the intelligence, legal research and writing skills, and personality to be an outstanding judicial clerk. Please do not hesitate contact me if I can provide you with any additional information. I can be reached at jb94@cornell.edu, or my cell phone is (803) 240-6701.

Very truly yours,

John H. Blume
Samuel F. Leibowitz Professor of Trial Techniques
and Director of the Cornell Death Penalty Project

United States Department of Justice

United States Attorney
District of Connecticut

Connecticut Financial Center
157 Church Street, 25th Floor
New Haven, Connecticut 06510

(203) 821-3700
Fax (203) 773-5376
www.justice.gov/usao-ct

February 15, 2023

Re: Letter of Recommendation for Ms. Michelle Briney

Greetings:

I am writing to give my wholehearted recommendation that Ms. Michelle Briney be offered a position with your chambers as a law clerk. For the reasons discussed below, I believe that Michelle would be a valuable addition to your courtroom.

Michelle has already proven herself as a member of the Department of Justice; indeed, I first came to know her through her participation in my Office's own 2022 Summer Internship Program, for which I am the program coordinator. Throughout the DOJ internship, Michelle established herself as someone who my colleagues could rely on for timely, responsive assistance. If she is given another opportunity to contribute to the federal justice system, I have every reason to believe that your chambers will have a similar positive experience.

Michelle displayed solid legal research and writing skills while with the District of Connecticut. Beginning at the very start of the summer, she proved her reliability by providing prompt and thorough assistance on a time-sensitive criminal appellate issue. She also conducted important research in support of a motion to suppress and ran to ground key evidentiary issues for an AUSA who was preparing for trial. It is worth noting that, in addition to her contributions to our Criminal Division, Michelle also volunteered for an assignment with our Civil Division that involved research into a local university's compliance with the Americans with Disabilities Act. Her interest and enthusiasm for all aspects of federal litigation made her a particularly enjoyable intern for AUSAs to work with on assignments. In my unconditional opinion, it also makes her particularly well-qualified to serve as a federal law clerk.

I observed Michelle's work ethic and professional demeanor firsthand when she assisted with one of my own cases. Michelle not only created a first draft of a sentencing memorandum in a drug trafficking case—which I ultimately filed with minimal editing—but she also appeared on the record for the United States at the sentencing hearing itself. She flawlessly presented a key portion of the government's sentencing argument in front of a district court judge. The significance of having a summer intern assist with this type of proceeding is indicative of the level of trust that my colleagues and I could place in Michelle. She was, of course, thoroughly prepared for this serious responsibility.

On a more personal level, Michelle is both likeable and appropriately humble. She quickly bonded with her fellow interns and was a genuine pleasure to interact with, both in the office and during our summer program's social events. In terms of her maturity and professionalism, I had full faith that she could be entrusted with representing the United States on the record, as detailed above. It is exactly these qualities that make me confident she would be an excellent clerk. And of course, as I am sure you can review from her transcripts, her academic achievements are remarkable.

I would be happy to discuss Michelle's qualifications in further detail. Please do not hesitate to contact me through any of the means of communication in my signature block.

Sincerely,

MARGARET M. DONOVAN
ASSISTANT UNITED STATES ATTORNEY
United States Attorney's Office
District of Connecticut
157 Church Street, 25th Floor
New Haven, CT 06510
Office: (203) 821-3819
Cell: (203) 901-9660
margaret.donovan@usdoj.gov

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Michelle Briney for a position as a judicial clerk.

Michelle was a second-year law student in my clinical course, Afghanistan Assistance Clinic, LAW 7790 at Cornell Law School, Fall 2022.

This course required students to work with Fulbright scholars recently arrived from Afghanistan to prepare and file affirmative asylum applications with the U.S. Citizenship and Immigration Service ("USCIS"). As clients, the Afghan scholars presented with trauma, grief and fear, and were sometimes overwhelmed to the point of passivity. To represent these clients effectively, students had to quickly learn to elicit with sensitivity stories of horrific mistreatment, plus learn enough of Afghanistan's culture, history, politics, governance and religion to form a coherent context for the client's personal narrative, and learn the basics of asylum law. An additional challenge was deciphering USCIS's filing requirements in the newly implemented online filing portal together with a rapidly evolving patchwork of U.S. immigration benefits programs affecting Afghan nationals.

The work product each student produced described a unique client and included a 10 to 20 page declaration or personal narrative of the client, an annotated document index of 50 or more documents, a legal brief and a 15-page government form. In sum, students faced significant pressure to research and produce a winning case of immeasurable value to their clients at a time of unsettled policies and facts regarding Afghanistan.

In this intense environment, Michelle Briney succeeded with ease. Michelle was an enthusiastic learner, digging into law and fact issues with vigor. She was also tireless in her support and commitment to her client. In this class, I felt that I knew Michelle's client best, because Michelle knew her client best and crafted her fact and law-based argument on her client's behalf so effectively. The declaration Michelle wrote with her client is an exemplary document that has potential to be de-identified and released as a powerful literary piece.

Similarly, Michelle's document index includes approximately 50 articles she found that squarely corroborate her client's claim. The legal memo is well researched and clear. As a person, Michelle is confident and unabashed, while being entirely receptive and social. I have the sense that she does her very best work on each assignment. Immigration cases and clinical courses lend themselves to team work. Michelle got along well with classmates, sharing her research discoveries and being respectful of classmates' perspectives. In class lecture, Michelle regularly contributed analytical comments and questions.

Based on my observations of Michelle Briney in this course, I believe she would be highly effective as a judicial clerk. Her easy management of a heavy caseload and level-headed approach to complex, new material may be valued in a judicial setting.

If I may be of further assistance, please do not hesitate to contact me.

Hilary T. Fraser, Esq.

Adjunct Professor
Afghanistan Assistance Clinic
Cornell Law School

Hilary Fraser - htf4@cornell.edu

MICHELLE E. BRINEY
107 E State Street, Apt. 413, Ithaca, NY 14850 • 203-228-8990 • meb392@cornell.edu

Writing Sample

This writing sample is a memorandum of law I wrote during my Summer 2022 internship with the Connecticut Office of the U.S. Attorney in New Haven, Connecticut. It concerns the application of Rule 16(a)(1)(B)(i) of the Federal Rules of Criminal Procedure.

My internship supervisor at the CT USAO has approved my use of this memo as a writing sample. Some identifying information has been anonymized for confidentiality; I have signaled these changes by placing them in double brackets. Otherwise, my work has not been edited by anyone else.

`QUESTION PRESENTED

Under Federal Rules of Criminal Procedure 16(a)(1)(B)(i), which requires the government to disclose any statements in its possession, custody, or control made by the defendant, if the attorney for the government knows or could have known through due diligence that the statement exists, was the government required to find and disclose an additional recording [[made by a third party, which the government had not known about?]]

BRIEF ANSWER

Probably not. The due diligence requirement of Rule 16(a)(1)(B)(i) only applies to recordings of the defendant that are in governmental custody, possession, or control. Prosecution and defense agree the relevant recording was not in governmental possession, custody, or control. Therefore, the government was not required to use due diligence under Rule 16(a)(1)(B)(i).

ANALYSIS

Rule 16(a)(1)(b)(i) of the Federal Rules of Criminal Procedure probably did not require the prosecution to find the additional recording. The government's Rule 16 and *Brady* obligations apply only to documents in the government's possession, custody, or control. The prosecutor is assumed to have constructive knowledge of all statements in the government's possession, and thus must exercise due diligence to find and disclose information under government control. However, there is no due diligence requirement for parties not under government control or part of the "prosecution team," even if the government should have known the evidence might exist. Thus, there was probably no obligation to find the recording, as both sides agree the recording was not in the government's possession, custody, or control.

The government's Rule 16 and *Brady* obligations only apply to documents within governmental possession, custody, or control. Fed. R. Crim. P. 16; *United States v. Brennerman*, 818 Fed. App'x 25, 29 (2d. Cir. 2020). Under Rule 16(a)(1)(B)(i), the government must disclose to defendants relevant recorded statements if the statements meet two conditions: the government's attorney knows or could know of the statement through due diligence, *and* the statement is within the government's possession, custody or control. Fed. R. Crim. P. 16(a)(1)(B)(i). Similarly, both *Brady* and Rule 16(a)(1)(E) require the government provide the defense with evidence in its possession that is material to the defense's case. Fed R. Crim. P. 16(a)(1)(E); *see also United States v. Chalmers*, 410 F.Supp.2d 278, 287 (S.D.N.Y. 2006). The definition of governmental possession, custody, and control is the same for all Rule 16 requests. *See United States v. Volpe*, 42 F. Supp. 2d 204, 221 (E.D.N.Y. 1999) (comparing Rule 16(a)(1)(A) and 16(a)(1)(C); *United States v. Stein*, 488 F.Supp.2d 350, 360-61 (S.D.N.Y. 2007). There is debate in the Second Circuit over the degree of similarity between Rule 16 and *Brady*; Rule 16's discovery obligations are arguably broader than those of Brady. *See United States v. Meregildo*, 920 F. Supp. 2d 434, 443 (S.D.N.Y. 2013). However, most courts apply the "prosecution team" standard to both Rule 16 and Brady: evidence must only be disclosed if it is within the possession, custody or control of "a government agency so closely aligned with the prosecution…as to be…part of the prosecution team." *United States v. Finnerty*, 411 F.Supp.2d 428, 432 (S.D.N.Y. 2006); *see also Chalmers*, 410 F.Supp.2d at 289 ("[T]he Court is not persuaded that 'government' for purposes of Rule 16 should be any broader than the 'prosecution team' standard…adopted in…*Brady*"). Under both *Brady* and Rule 16, the government has no responsibility to obtain items not under its control. *See Brennerman*, 818 Fed. App'x at 29 ("The government's discovery and disclosure obligations extend only to information and documents in

the government's possession."); *United States v. Tomasetta*, No. 10 Cr. 1205, 2012 WL 896152 at *5 (S.D.N.Y. Mar. 16, 2012) ("Since the [Rule 16] materials…were outside of the government's control, it had no Rule 16 obligation to discover or obtain these materials").

The government is required to use due diligence to obtain recordings and exculpatory evidence in its possession. Fed. R. Crim. P. 16(a)(1)(B)(i); *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998). The government's discovery obligations only apply to evidence that is known to the prosecutor. *Avellino*, 136 F.3d at 255. However, "an individual prosecutor is presumed…to have knowledge of all information gathered in connection with his office's investigation." *Id.* The due diligence requirement stems from this constructive knowledge—thus prosecutors have "a duty to learn of any favorable evidence known to the others acting on the government's behalf." *Id.* This prevents prosecutors from having their cake and eating it too—the prosecution cannot have easy access to relevant evidence *and* avoid disclosure because the evidence is technically held by another agency. *See United States v. Giffen*, 379 F.Supp.2d 337, 342 (S.D.N.Y. 2004). While the prosecution cannot be "willfully blind" to information it holds, it does not have a duty to learn about information it does not possess and does not have constructive knowledge of. *Meregildo*, 920 F.Supp.2d at 445. "In the Second Circuit, a prosecutor's constructive knowledge only extends to…the prosecution team." *Id.* at 440-41. Thus, Rule 16 does not apply if individuals are not part of or controlled by agencies involved in the case. *See id.*

There is no due diligence requirement for information from third parties that are neither under the control of the government nor part of the prosecution team. *See United States v. Hutcher*, 622 F.2d 1083, 1088 (2d Cir. 1980). In *United States v. Finnerty*, the court considered a Rule 16 request for a New York Stock Exchange (NYSE) internal study. *Finnerty*, 411

F.Supp.2d at 432. This study was in the possession of the NYSE; while the NYSE had previously provided documents to the government, the government had not seen or reviewed this study. *Id.* The court denied the request, ruling that Rule 16 only applied if the NYSE was a government agency involved in a joint investigation. *Id* at 432-33. Because it was neither, the government had no obligation to obtain the study. *Id* at 434.

Similarly, the government is usually not responsible for incomplete information produced by subpoenaed or cooperating witnesses and third parties. *United States v. Weaver*, 992 F.Supp.2d 152, 157 (E.D.N.Y. 2014). Third party information might be under government control when there is a legal agreement allowing the government unqualified access. *See Stein*, 488 F.Supp.2d at 362-64 (granting a Rule 16(a)(1)(E) request because the company that held the information had signed a Deferred Prosecution Agreement). However, in *United States v. Weaver*, defendants requested production of "any and all documents" possessed by cooperating witnesses. 992 F.Supp.2d at 157. The court ruled the government's obligations were satisfied by a broad request for information from each witness, even if the witnesses provided incomplete information. *Id.* It stated that "[t]o the extent that the cooperating witnesses withheld [relevant] documents…from the government in response to its request, the government is not required to produce such documents." *Id.* As long as the government turned over any subsequent information received from witnesses, it had no additional Rule 16 or *Brady* obligations. *Id.* Similarly, the court in *United States v. Tomasetta* said that "documents in the hands of cooperating third parties are not attributable to the government." 2012 WL 896152 at *4. In *Tomasetta*, the government issued several subpoenas, and stated it gave defendants all the information received. *Id.* at *1, *4. While the government knew relevant notebooks by a key witness might exist, the notebooks were not given to the government until the eve of trial. *Id.* at

*2-3. Once the government possessed the notebooks, it promptly disclosed them to the defense. *Id.* The court ruled the failure to discover the notebooks earlier did not violate Rule 16. *Id.* at *5. Documents that must be subpoenaed are not controlled by the government, and the government had no obligation to discover materials not in its control. *Id.*; *see also Brennerman*, 818 Fed. App'x at 29 (saying the government fulfilled *Brady* by turning over every document received from a bank, even though the documents did not include exculpatory personal notes); *United States v. Villa*, No. 3:12cr40, 2014 WL 280400 (D. Conn. Jan. 24, 2014) ("To the extent that Defendant seeks documents in the possession or control of Eli Lilly rather than the government, it appears that *Brady* and Rule 16 do not require [government disclosure]").

This standard probably applies even if the government suspected or should have known that the third party held additional relevant information. *See Tomasetta* 2012 WL 896152 at *2. In *Tomasetta*, the government was aware for several months that the notebooks could exist, and did not follow up on a subpoena asking for the notebooks. *Id.* The court said that, while the government *should* have acted sooner, it fulfilled Rule 16 by promptly producing the notebooks once it possessed them. *Id.* at *5-6. Similarly, in *United States v. Hutcher*, defendant argued the government was required to provide contradictory statements made by a witness in a previous trial. 622 F.2d at 1088. The Court rejected the argument, stating that the trial testimony was possessed by the district court and thus not controlled by the prosecution. *Id.* It made this ruling even though the prosecution had obtained and disclosed the previous trial's docket sheet—which would have notified the prosecution that the district court's records held more information about the witness. *See id.* Finally, in *United States v. Avenatti*, Avenatti argued the government had deliberately failed to gain information from servers held by a bankruptcy trustee, despite knowing of their importance to the case. No. 19-CR-374, slip op. at 12 (S.D.N.Y. Feb. 15, 2022).

He also argued that, under Rule 16, the U.S. Attorney's Office prosecuting him should have obtained server information held by a U.S. Attorney's Office in California, which was prosecuting a separate case against Avenatti. *Id.* at 2, 6. The court rejected both Avenatti's arguments. *Id.* at 11-12. It said the California U.S. Attorney's Office was not part of the prosecution team under Rule 16, and that the government had no duty to try to obtain information it did not possess. *Id.* Thus, *Brady* and Rule 16 "[did] not require the Government to make efforts to "acquire" the Servers from the Bankruptcy Trustee or anyone else." *Id* at 12.

CONCLUSION

The government probably did not violate Rule 16(a)(1)(B)(i), because it was not required to use due diligence when collecting [[the third party's]] tapes. Rule 16's requirements only apply to documents in the government's possession, custody, or control. Both sides agree the tapes were never in governmental possession, custody, or control. Thus, the government was not required to conduct due diligence. As in *Finnerty*, *Weaver*, and *Tomasetta*, the [[materials]] were held by a third party that was not a governmental agency or part of the prosecution team. *Finnerty*, 411 F.Supp.2d at 433; *Weaver*, 992 F.Supp.2d at 157; *Tomasetta*, 2012 WL 896152 at *5. There was no legal agreement with the government to produce information. *Tomasetta*, 2012 WL 896152 at *5. Like *Weaver* and *Tomasetta*, the reason the government did not obtain the recording earlier is because the third party gave incomplete information. *Id.* at *2; *Weaver*, 992 F.Supp.2d at 157. Arguably, the prosecution should have known that additional recordings existed. However, in *Tomasetta*, *Hutcher*, and *Avenatti*, the government did not have an obligation to obtain additional information, even if had reason to believe additional information existed. *Tomasetta*, 2012 WL 896152 at *6; *Hutcher*, 622 F.2d at 1088; *Avenatti*, No. 19-CR-374, slip op. at 12 (S.D.N.Y. Feb. 15, 2022). Thus, Rule 16(a)(1)(B)(i) due diligence only applies

once evidence is controlled by the government. As long as the government promptly disclosed the recording once it obtained it, it probably fulfilled its disclosure obligations.

Applicant Details

First Name	**Emani**
Last Name	**Brown**
Citizenship Status	**U. S. Citizen**
Email Address	**emani.brown@utexas.edu**
Address	**Address** **Street** **4600 Mueller Blvd, Apt 2104** **City** **Austin** **State/Territory** **Texas** **Zip** **78723** **Country** **United States**
Contact Phone Number	**915-926-9087**

Applicant Education

BA/BS From	**Rice University**
Date of BA/BS	**May 2021**
JD/LLB From	**The University of Texas School of Law** **http://www.law.utexas.edu**
Date of JD/LLB	**May 4, 2024**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Davis, Jacquelyn
Jdavis@trla.org
Sifuentes Davis, Lia
lia.davis@law.utexas.edu
(512) 232-7222
Mason, Lori
lmason@law.utexas.edu
5126988439

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ms. Lawryn Emani Brown
4600 Mueller Blvd, Austin, TX 78723 | 915-926-9087 | emani.brown@utexas.edu

June 12, 2023

The Honorable Jamar Walker
United States District Court
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granbury Street
Norfolk, Virginia 23510

Dear Judge Walker:

I am currently a second-year student at the University of Texas School of Law, and I am pleased to apply for a clerkship position in your chambers for the 2024-term. It is my wish to work as a public interest litigator after I graduate, so I am particularly interested in clerking for you because of your vast experience in litigation.

Throughout my life I have overcome adversity through hard work, determination, and the support of my family, friends, and mentors. I will not only contribute to your chambers by my demonstrated work ethic and research and writing abilities, but also my multicultural background. As a Black and Mexican-American woman raised in the binational community of El Paso, Texas, I have always known that as an attorney, I want to serve the communities that raised me – the Black and Latinx communities. It is my goal to use my law degree to connect with, advocate for, and empower marginalized communities across the nation.

My application includes a resume, transcript, and writing sample. Letters of recommendations by Mrs. Jacquelyn Davis, Professor Lori Mason, and Professor Lia Sifuentes Davis are included. These recommenders may be reached as follows:

- Jacquelyn Davis, Texas RioGrande Legal Aid, JDavis@trla.org, 512-374-2756
- Professor Lori Mason, The University of Texas School of Law, LMason@law.utexas.edu, 512-232-1335
- Professor Lia Sifuentes Davis, The University of Texas School of Law, Lia.Davis@law.utexas.edu, 512-232-7222

In addition, the Law School's clerkship advisor, Kathleen Overly, is available to answer your questions. You may reach her at koverly@law.utexas.edu or 512-232-1316. If I may provide any additional information, please contact me.

Thank you for your time and consideration.

Respectfully,

Emani Brown

Ms. Lawryn Emani Brown
4600 Mueller Blvd, Austin, TX 78723 | 915-926-9087 | emani.brown@utexas.edu

EDUCATION

The University of Texas School of Law, Austin, TX
J.D. expected May 2024
GPA: 3.19

- TEXAS HISPANIC JOURNAL OF LAW AND POLICY, *Submissions Editor*
- William Wayne Justice Center, *Public Service Scholar*
- Chicano and Hispanic Law Students Association, *Alumni Chair*; and Thurgood Marshall Legal Society, *Member*
- Gender Violence Law Caucus, *Co-founder*
- Pro Bono Scholar: Parole Packet Representation; Pro Bono in January, *Texas Advocacy Project Intern*
- Law Students 4 Black Lives, Student Achievement Scholarship Recipient
- National Association of Women Judges, Access to Justice Scholarship Recipient

Rice University, Houston, TX
B.A. *magna cum laude* in Psychology; Study of Women, Gender, and Sexuality received May 2021
GPA: 3.93

- Black Student Association, *President* (2020- 21); *Gala Coordinator* (2019- 20); Outstanding Senior Award
- Loewenstern Fellow, Center for Civic Leadership (2020-2021)
- Diversity Council, Jones Residential College, *Co-founder* and *Co-chair* (June 2020-May 2021)
- Teaching Assistant, Introduction to Cognitive Psychology (September 2019-December 2019)
- Research Assistant, WorKing Resilience Lab (September 2018-May 2019)

EXPERIENCE

ACLU of Texas, Houston, TX
Law Clerk, June 2023-August 2023 (expected)

Volunteer Legal Services, Austin, TX
Scott Ozmun Fellow**,** August 2022-May 2023
Responsible for conducting applicant intakes and placing cases with pro bono attorneys.

Texas RioGrande Legal Aid, Austin, TX
Law Clerk in Family Law/Domestic Violence Team, May 2022-August 2022
Drafted documents for clients; assisted with trial prep; conducted legal research.

Full Circle Strategies Consulting Agency, Houston, TX
Research Analyst Intern**,** June 2020-August 2020
Engaged in strategy, research, and program development concerning anti-racism, diversity, equity, and inclusion.

Center of Study of Women, Gender, and Sexuality, *Rice University,* Houston, TX
Seminar and Practicum in Engaged Research**,** September 2019-May 2020
Collaborated with the Tahirih Justice Center in Houston and researched issues of gender, violence, and immigration; presented "Documenting Fears Among Latinx Immigrant Survivors of Gender-Based Violence."

Texas Criminal Justice Coalition, Houston, TX
Intern**,** September 2019-December 2019
Conducted policy research regarding bail/pretrial practices and ways to reduce mass incarceration in Texas.

Origins of Social Cognition Lab, *Yale University,* New Haven, CT
REU Intern**,** June 2019-August 2019
Collected data in the Social Cognitive Development Lab and the Canine Cognition Lab. Presented "Children's Affiliation Predictions when Shared Preferences and Group Membership Conflict" at the Yale Inter-Developmental Poster Session.

Dr. James Schutte*, Forensic Psychologist*, El Paso, TX
Intern**,** May 2018-August 2018
Conducted mental status interviews and psychological testing with patients; researched for criminal court.

LANGUAGE & INTERESTS

Native in Spanish; Enjoy cooking traditional Mexican food and lap swimming for physical and mental wellbeing

Prepared on June 2, 2023

THE UNIVERSITY OF TEXAS SCHOOL OF LAW

UNOFFICIAL TRANSCRIPT PRINTED BY STUDENT

PROGRAM: Juris Doctor

OFFICIAL NAME: BROWN, LAWRYN E.
PREFERRED NAME: Brown, Lawryn E.

DEGREE: in progress seeking JD TOT HRS: 59.0 CUM GPA: 3.19

FAL 2021	427	TORTS		4.0	B	WEW
	332R	LEGAL ANALYSIS AND COMM		3.0	B+	LRM
	531	PROPERTY		5.0	B	MFS
	423	CRIMINAL LAW I		4.0	B	GBS
SPR 2022	421	CONTRACTS		4.0	B+	OB
	232S	PERSUASIVE WRTG AND ADV		2.0	B+	SJP
	433	CIVIL PROCEDURE		4.0	C+	AMD
	434	CONSTITUTIONAL LAW I		4.0	B	WEF
FAL 2022	483	EVIDENCE		4.0	B+	GBS
	383C	CRIMINAL PROCDR: BAIL T		3.0	A-	JEL
	385	PROFESSIONAL RESPONSIBI		3.0	B+	LDW
	387D	ADVOCACY SURVEY		3.0	B+	DMG
	187E	ADVOCACY SURVEY: SKILLS	P/F	1.0	CR	MFB
SPR 2023	389C	FAMILY LAW		3.0	A-	SHW
	697C	CLINIC: CIVIL RIGHTS	P/F	6.0	CR	LSD
	396W	STATUTORY INTERPRETATIO		3.0	B	BAP
	397S	SMNR: RACE PERSPCT FUTU		3.0	A	LNM

	HOURS ATTEMPT	HOURS PASSED	EXCLUDE P/F	SEM AVG
FAL 2021	16.0	16.0	16.0	3.06
SPR 2022	30.0	30.0	30.0	2.93
FAL 2022	44.0	44.0	43.0	3.39
SPR 2023	59.0	59.0	52.0	3.57

06-02-2023

EXPLANATION OF TRANSCRIPT CODES

GRADING SYSTEM

LETTER GRADE	GRADE POINTS
A+	4.3
A	4.0
A-	3.7
B+	3.3
B	3.0
B-	2.7
C+	2.3
C	2.0
D	1.7
F	1.3

Effective Fall 2003, the School of Law adopted new grading rules to include a required mean of 3.25-3.35 for all courses other than writing seminars.

Symbols:

Q	Dropped course officially without penalty.
CR	Credit
W	Withdrew officially from The University
X	Incomplete
I	Permanent Incomplete
#	Course taken on pass/fail basis
+	Course offered only on a pass/fail basis
*	First semester of a two semester course

A student must receive a final grade of at least a D to receive credit for the course. To graduate, a student must have a cumulative grade point average of at least 1.90.

COURSE NUMBERING SYSTEM

Courses are designated by three digit numbers. The key to the credit value of a course is the first digit.

101	-	199	One semester hour
201	-	299	Two semester hours
301	-	399	Three semester hours
401	-	499	Four semester hours
501	-	599	Five semester hours
601	-	699	Six semester hours

SCHOLASTIC PROBATION CODES

SP	=	Scholastic probation
CSP	=	Continued on scholastic probation
OSP	=	Off scholastic probation
DFF	=	Dropped for failure
RE	=	Reinstated
EX	=	Expelled

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to write in support of Emani Brown's clerkship application. I had the good fortune to meet Emani through a mentorship program at the University of Texas School of Law and I knew immediately that she is suited for this profession and will serve it honorably. We connected immediately as we are both Texas border natives, and first-generation and as the only lawyer/aspiring lawyer in our families. I directly supervised Emani's work as a summer intern, and we have stayed in close contact throughout her law school career. Based on my observations of her work and her character, I have no doubt that she would be an outstanding clerk.

At the time of her internship, I managed the Domestic Violence and Family Law Team at Texas RioGrande Legal Aid, Inc. (TRLA), which is the second-largest legal aid organization in the United States. The family law team is one of the largest litigation groups at TRLA and our mission is to represent indigent survivors of violence. In my sixteen years at TRLA, I have had many opportunities to work with and supervise young lawyers and law students. The work is challenging, both professionally and emotionally, and many talented people are not suited to the pace and unique trials of working at the intersection of crisis and poverty.

Emani distinguished herself as motivated and highly capable. I discovered quickly that she could handle a wide range of assignments as fast as we could give them to her and produce quality work without micromanagement. As a result, Emani was quickly assigned high-level assignments, such as drafting pleadings and correspondence, responding to discovery, and researching complex legal questions. Notably, Emani performed extensive, time-sensitive research on a case involving complex issues and The Hague Convention prior to a TRLA manager's oral argument before the Fifth Circuit (and was able to observe her research being used on the livestream).

Emani is a rare student and possesses skills and innate wisdom that set her apart from others. For example, Emani has excellent oral and written communication skills. She is also bilingual in English and Spanish, a capability which appears to be in short supply among lawyers, even in Texas. Of critical importance, her demeanor is professional and kind, and as a result, we entrusted her with interacting directly with clients. Emani develops trust and connections with ease, and I observed her generous mentorship of another TRLA intern, a first-generation college student with law school aspirations. I think Emani would never forget that an important part of working for the future is holding out a hand to those who come behind you.

In addition to doing great work, Emani is a pleasure to have on a team and was well-liked by all of her colleagues, including peers, attorneys, and support staff. Because of her initiative in seeking out real-life work opportunities involving research, litigation, self-representation clinics, and working a public interest internship during the school year, Emani would begin her clerkship with a unique breadth of experience. I most admire attorneys who can balance a strong work ethic with a commitment to public service, and I am confident that Emani would represent you well.

If given the opportunity to work with you, I know that Emani would succeed, and it is my pleasure to recommend her to you. I look forward to her very bright future and I am encouraged to know that the next generation of lawyers has her in it.

Warm Regards,

Jacquelyn V. Davis, Esq.
Deputy Civil Director

Jacquelyn Davis - Jdavis@trla.org

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in support of Emani Brown's application for a clerkship in your chambers. I am the Interim Director and Visiting Professor for the Civil Rights Clinic at the University of Texas School of Law. During the course of Emani's involvement in the Clinic, I had the opportunity to supervise and evaluate her legal research and writing, collaboration with classmates and clients, as well as her legal strategizing, and oral advocacy. Having worked closely with her for the semester, I am honored to recommend her for a judicial clerkship position.

In the Clinic, Emani worked on a case involving the death of a man in a private immigration detention center. Though the litigation was at a slow point procedurally, our partner organization took the procedural lull as an opportunity to assign a myriad of research assignments as a way to get ahead of some of our future work. Week after week, Emani took on new and varied research assignments in preparation for mediation, possible settlement, or summary judgment. Our co-counsel wanted to fit in as many research assignments as possible so Emani was on a tight deadline for each assignment. She easily met every deadline and her research and writing were both excellent. Despite all the assignments, it even seemed like she was having fun! Emani was very skilled at understanding the question presented and identifying the best cases to address the question. For example, Emani presented very well-organized research on whether the affirmative defenses that had been raised by the defendant would likely be successful in our case. Though our co-counsel had already begun research on this assignment, Emani found a case that was exactly on point for the issue that our co-counsel had overlooked. She was also a very clear oral communicator. In addition to the drafted written memos on the research she conducted, she also presented them to our co-counsel in weekly Zoom meetings. Emani was effective at explaining her research and answering the questions our co-counsel had about the facts and court's reasoning.

Emani also worked on a policy research project involving worker safety and economic development tax incentives. This project required an entirely different skill set. She had no previous knowledge of this area of law or policy, but she dove right in and spent the semester researching how municipalities can ensure worker safety through their tax incentive contracts. The project required creativity, both in developing solutions, but also in making appropriate contacts. With very little guidance, she and her partner put together two comprehensive and well-written memos on the topic. This required they meet with experts in the field and research how municipalities in other states have been successful in protecting worker safety through tax incentives. It also required that they learn the mechanisms within Texas law to enforce such contractual worker safety issues. The two memos covered a large scope, but Emani's writing was cogent and concise. Despite the wide-ranging topics covered, Emani broke down the pieces to allow the reader to easily follow the proposed solutions and the possible barriers to the solutions. Throughout, it was a pleasure to watch Emani collaborate with her teammate. It was evident Emani was an ideal partner as she was always organized, generous, and positive.

Emani was one of the most consistently prepared and engaged students in the seminar component of the Clinic. The seminar is a twice-weekly seminar on civil rights law, in which I lecture on both civil rights laws and cases and claims and litigation procedure and skills. We incorporate broader issues into the discussion, such as professional identity, the complexities of the judicial landscape, inequity of access to the judicial system, and developing client relationships. In the Clinic seminar, Emani easily digested difficult material and demonstrated her engagement with complex legal issues, both substantive and procedural. She was an active participant in class and had a sophisticated understanding of constitutional law. I also appreciated how respectful Emani was of her classmates in the seminar. She carefully listened to other students and offered direct responses to their discussions.

Emani has shown herself to be a committed legal mind, but what stands out the most about her is her clear and warm communication style. She is both prepared and genuine. Throughout the semester, she asked important questions aimed at solving the problems in the legal system and demonstrated a deep understanding of how the legal system relates to the rest of our society. I admired Emani for the way she treated her classmates and the generosity she brought to her work. She worked with humility and care and the legal field needs more lawyers like her. The legal profession will be better because she will be in it and I am proud to count myself as one of her colleagues.

If you have any questions or need any additional information, please call me at (512) 699-1845 or lia.davis@law.utexas.edu. I'd be happy to talk more about Emani's qualifications.

Sincerely,

Lia Sifuentes Davis
Visiting Clinical Professor of Law and
Interim Director of the Civil Rights Clinic
The University of Texas School of Law

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to write in support of Emani Brown's application for a clerkship in your chambers. Emani was a student in my Legal Analysis and Communication class, our first-year legal-writing course. In this course, students prepare a series of written assignments, including two full legal memoranda using their own research along with preliminary problems using a packet of authorities.

Emani is a shining star. Many things stand out about Emani, in addition to her legal research and writing skills. She has an inimitable warmth and personable presence in every situation. It is a joy to be around her. She brings her best to every situation. She is intellectually curious, hard-working, and dedicated to improving her already-excellent skills. Rarely have I encountered a student so determined to develop her professional skills. She took advantage of every opportunity to do better with each assignment, and she consistently did so. She has a can-do attitude and is not afraid to ask appropriate questions to deliver the highest-quality work product.

Emani would be a wonderful asset in any chambers, especially one that involves interaction with practicing attorneys. If you interview Emani, you will notice her sunny disposition. What's wonderful is that she is also mature, firm, and steady. I think she would be able to manage with ease interactions some new graduates find difficult.

Over my nearly 30-year career, which has included clerking, practicing law, and teaching, Emani stands out as a student and young lawyer whose career I will eagerly watch. I expect her to do great things.

I hope you will give Emani's application serious consideration.

Sincerely,

Lori R. Mason
Lecturer, The David J. Beck Center for Legal Research, Writing, and Appellate Advocacy
The University of Texas School of Law

Ms. Lawryn Emani Brown
4600 Mueller Blvd, Austin, TX 78723 | 915-926-9087 | emani.brown@utexas.edu

WRITING SAMPLE

This writing sample is a memorandum I wrote as a student attorney in the Civil Rights Clinic. I was granted permission to use this memo as a writing sample by the co-counsel for whom this research was done. All sensitive and identifying information has been redacted from the work or changed to pseudonyms in order to maintain client confidentiality.

MEMORANDUM

From: Emani Brown

To: Non-Profit Organization

Date: May 6, 2023

Re: Responding to Affirmative Defenses in a Wrongful Death Suit

QUESTION PRESENTED

1. Can an Immigration Detention Center ("IDC") successfully assert, under Section 93 of the Texas Civil Practice & Remedies Code, the affirmative defense of suicide, or invoke the common law unlawful acts doctrine against a survivorship action when the defendant allegedly breached their duty of care, and the act of suicide was foreseeable?
2. Under Section 33 of the Texas Civil Practice & Remedies Code, can an IDC successfully assert an affirmative defense of proportionate responsibility against a survivorship action to bar recovery when the alleged negligence occurred while Mr. Jones was under the sole care and supervision of the IDC staff?

BRIEF ANSWER

1. Likely not. IDC owed a legal duty of care to Mr. Jones, and the exclusive act of Mr. Jones committing suicide is insufficient on its own to render him liable for his death. The Texas Supreme Court understood the legislative shift to a proportionate responsibility scheme as an indication of an intent to reduce recovery, rather than completely bar it, and held that the unlawful acts doctrine was therefore not a viable defense. *Dugger v. Arredondo*, 408 S.W.3d 825, 830-32 (Tex. 2013). Furthermore, to attribute causation for breach of a mental health standard of care to Mr. Jones, whose undiagnosed mental impairment was the very cause of the injury, would be "clearly contrary" to legislative intent. *See RioGrande Regional*

Hospital v. Villareal, 392 S.W.3d 594, 623 (Tex. App. — Corpus Christi 2010). Mr. Jones was struggling with his mental wellbeing while at IDC, and IDC violated an applicable standard of care by not responding to it. IDC is liable, not Mr. Jones. Therefore, a court is unlikely to find merit in an invocation of the suicide defense or the unlawful acts doctrine.

2. Likely not. IDC owed a legal duty of care to Mr. Jones, and the exclusive act of Mr. Jones committing suicide cannot serve to bar recovery. Under Chapter 33, a claimant is only completely barred from recovering damages if their percentage is greater than fifty percent. Tex. Civ. Prac. & Rem. Code Ann. § 33.001. The theory of this case is that Mr. Jones' action of committing suicide was not "the sole cause of the damages sustained," but rather that his death flowed from IDC's negligence. See Tex. Civ. Prac. & Rem. Code Ann. § 93.001(a)(2). Where a plaintiff didn't take any actions apart from the act of committing suicide that violated an applicable standard of care, there is no proportionate responsibility. *RioGrande Regional Hospital v. Villareal*, 392 S.W.3d 594, 624 (Tex. App. — Corpus Christi 2010). IDC violated an applicable standard of care; Mr. Jones did not. Furthermore, Texas courts have understood the proportionate responsibility statute to trump the common law unlawful acts doctrine and as circumventing the suicide defense. *See Dugger*, 408 S.W.3d at 832; *RioGrande Regional Hospital*, 329 S.W.3d at 623. Thus, IDC is unlikely to be successful in asserting the proportionate responsibility defense to bar recovery.

STATEMENT OF FACTS

[OMITTED]

DISCUSSION

I. IDC is unlikely to be successful in asserting the unlawful acts doctrine or the affirmative defense of suicide since Mr. Jones did not take any action that violated an applicable standard of care, apart from the act of committing suicide.

Texas courts have long understood the proportionate responsibility statute to trump the common law unlawful acts doctrine and as circumventing the suicide defense. *See Dugger*, 408 S.W.3d at 832; *RioGrande Regional Hospital*, 329 S.W.3d at 623. Where both the affirmative defense of suicide and proportionate responsibility are invoked, the affirmative defense of suicide has no merit if the defendant breached an applicable duty of care and caused the suicide in whole or in part. *RioGrande Regional Hospital*, 329 S.W.3d at 624. Where both the common law unlawful acts doctrine and proportionate responsibility defense are asserted, the court has found that the common law unlawful acts doctrine is not a viable defense within the confines of the proportionate responsibility statute. *Dugger*, 408 S.W.3d at 832.

Where there is no evidence that the decedent took any actions that violated an applicable standard of care, apart from the act of committing suicide, there is no proportionate responsibility. *RioGrande Regional Hospital*, 329 S.W.3d at 624. In *RioGrande Regional Hospital*, the court held that it was error for the lower court to submit the decedent's proportionate responsibility defense after the jury had already rejected the appellants' suicide affirmative defense. *Id*. The survivors of a hospital patient who committed suicide while in the hospital's care filed a suit against the hospital asserting medical malpractice and wrongful death. *Id.* at 604. Included in the negligence claims was a claim that the appellants "fail[ed] to properly and timely monitor and/or check" on the decedent. *Id*. The court reasoned that to attribute causation for breach of a mental health standard

of care to the patient whose undiagnosed mental impairment was the very cause of the injury would be "clearly contrary" to §93.001(a)(2)'s intent. *Id*. at 623 (citing *Dowell*, 262 S.W.3d at 337 (O' Neill, J., dissenting)). The court also stated that discussion of the decedent's proportionate responsibility under Section 33.001 circumvents discussion under Section 93.001(a)(2). *Id*. Section 93.001 states that the affirmative defense of suicide may not be asserted if the defendant breaches an applicable duty of care and causes the suicide in whole or in part. *Id*. at 624. If the act or omission (in this case, the suicide) is reasonably foreseeable at the time of the defendant's alleged negligence, it can be considered a "concurring cause as opposed to a superseding or new and independent cause." *Id*. at 617, citing *Columbia Rio Grande Healthcare, L.P. v. Hawley,* 284 S.W.3d 851, 857 (Tex. 2009). The court, in applying Supreme Court precedent, held that the decedent's suicide, "at best, [c]ould be considered a concurrent cause." *Id*. at 619. Based on the reasoning set out by this court, a decedent's suicide will likely not be found to support an assertion of the proportionate responsibility defense.

Furthermore, the Legislature's adoption of the proportionate responsibility scheme is indicative of its intention to apportion responsibility where appropriate, rather than bar recovery completely. *Dugger*, 408 S.W.3d at 827. In *Dugger*, a mother brought a wrongful death action against her son's friend, following her son's death after ingesting heroin. *Dugger*, 408 S.W.3d at 827. She alleged that the friend was negligent in delaying calling emergency services and failing to advise paramedics that her son had ingested heroin. *Id*. The defendant asserted both the proportionate responsibility defense and the unlawful acts doctrine. *See Id*. The Court analyzed how the proportionate responsibility defense and the unlawful acts doctrine coexist. *Id*. The Court stated that the legislative shift to a proportionate responsibility scheme indicated an intent to reduce recovery, rather than completely bar it. *Id*. at 830. Because of this understanding of legislative

intent, the Court concluded that the unlawful acts doctrine was not a viable defense under the confines of the proportionate responsibility statute. *Id*. at 832. The Court accordingly affirmed the judgment of the court of appeals, which reversed the summary judgment for the defendant and remanded the case to the trial court. *Id*. at 836.

Just as in *RioGrande Regional Hospital*, Mr. Jones committed suicide while in the care and under the supervision of the IDC's medical team. *See RioGrande Regional Hospital*, 329 S.W.3d at 624. Additionally, Mr. Jones' act of suicide was also reasonably foreseeable. *Id*. at 617. Upon his arrival to IDC, he told a nurse that he had been threatened by drug traffickers. IDC_00081. About a month later, after his CFI, a case manager at IDC emailed the mental health team to request an evaluation, given the bad news that Mr. Jones had recently received about his asylum case. Jones_00000049. The unnamed case manager noted that Mr. Jones appeared "upset and sad." Jones_00000049. Thus, IDC was aware of how Mr. Jones' negative CFI result affected him emotionally. IDC ignored the accumulation of evidence of Mr. Jones' mental distress and potential suicidality. Prior to Mr. Jones' death, IDC was aware of at least three of the four of the "Suicide Risk Indicators Often Observed" listed on slides in an untitled IDC training on suicidality — namely, that Mr. Jones had recently received bad news from a court hearing; he reported insomnia; and he told the psychologist that he experienced anxiety. IDC_000924. Because of this, a court would likely reason, just as the court did in *RioGrande Regional Hospital*, that to attribute causation for breach of a mental health standard of care to Mr. Jones, whose undiagnosed mental impairment was the very cause of the injury, would be "clearly contrary" to legislative intent. *RioGrande Regional Hospital*, 329 S.W.3d at 623.

Although the facts in *Dugger* are distinguishable from Mr. Jones' case, *Dugger* highlights the way affirmative defenses commonly asserted together in wrongful death cases interact based

on the legislative intent behind the statutes. *Dugger*, 408 S.W.3d at 832. In reaching its holding that the unlawful acts doctrine was not a viable defense under the confines of the proportionate responsibility statute, the Court highlighted some of the legislative intent behind Chapter 33. *Id*. at 327. Therefore, a court will have a clearer understanding of the purpose behind the proportionate responsibility scheme and how to apply Chapter 33 to Mr. Jones' case. *Id*.

II. It is unlikely IDC will be able to successfully assert a proportionate responsibility defense.

IDC will likely be unable to assert the proportionate responsibility defense. The proportionate responsibility statute allows a tort defendant to designate as a responsible third party a person who is alleged to have caused in any way the harm for which the plaintiff seeks damages. Tex. Civ. Prac. & Rem. Code Ann. § 33.001-33.002. Once asserted, the factfinder is to determine the percentage of responsibility for "(1) each claimant; (2) each defendant; (3) each settling person; and (4) each responsible third party who has been designated under § 33.004." Tex. Civ. Prac. & Rem. Code Ann. § 33.003. If a claimant's responsibility exceeds fifty percent, the claimant is barred from recovering any damages. Tex. Civ. Prac. & Rem. Code Ann. § 33.001.

Chapter 33 applies to "any cause of action based on a tort." Tex. Civ. Prac. & Rem. Code Ann. § 33.002. This includes a survivorship action brought in a wrongful death case. *Dugger*, 408 S.W.3d at 831. In a wrongful death case, a "claimant" includes the person who was injured, was harmed, or died or whose property was damaged; and any person who is seeking, has sought, or could seek recovery of damages for the injury, harm, or death of that person or for the damage to the property of that person. Tex. Civ. Prac. & Rem. Code Ann. § 33.011. Thus, when the claim involves death, "claimant" includes not only the party seeking damages, but also the decedent. *JCW Electronics, Inc., v. Garza*, 257 S.W.3d 618, 707 (Tex. 2008). Therefore, in this case, IDC

can assert the proportionate responsibility defense against any of the three claimants – Mr. Jones, his father, or his son.

The proportionate responsibility statute, however, "indicates the Legislature's desire to compare responsibility for injuries rather than recovery," even if the claimant was partially at fault or violated some legal standard. *Dugger*, 408 S.W.3d at 832. The Legislature's adoption of the proportionate responsibility scheme in Chapter 33 evidenced its clear intention that a plaintiff's illegal conduct not falling within a statutorily recognized affirmative defense be apportioned rather than barring recovery completely. *Id*. at 827. As previously mentioned, it is unlikely that the Legislature intended to attribute causation for breach of a mental health standard of care to the patient whose undiagnosed mental impairment was the very cause of the injury. *RioGrande Regional Hospital*, 392 S.W.3d at 623. Suicide is preventable. *Providence Health Center v. Dowell*, 262 S.W.3d 324, 330 (Tex. 2008). Where the decedent plaintiff did not take any actions that violated an applicable standard of care, apart from committing suicide, there is no proportionate responsibility. *RioGrande Regional Hospital*, 329 S.W.3d at 624. In asserting the proportionate responsibility affirmative defense, IDC has the burden of pleading and proving the elements. *See Id*. at 621.

There is sufficient evidence suggesting IDC's negligence in monitoring and properly responding to Mr. Jones' deteriorated mental health while at IDC. The Supreme Court of Texas has specifically held that suicide is preventable. *Providence Health Center*, 262 S.W.3d at 330. In *Providence Health Center*, parents of a patient who committed suicide following the discharge from emergency room where had been treated a failed suicide attempt, brought a wrongful death and a survivorship action against the defendants. *Id*. at 327-28. While the patient was in the hospital, the nurses and doctors failed to make a comprehensive assessment of his risk of suicide.

Id. at 326. Even though the Supreme Court of Texas ultimately held that there was no evidence that the defendants caused the suicide, it recognized that suicide is preventable and that had the decedent had stayed with his family as instructed, he would not have hanged himself when he did. *Id*. at 330.

In *JCW Electronics*, the Court held that a party who seeks damages for death or personal injury under a breach of implied warranty claim is subject to Chapter 33's proportionate responsibility scheme. *JCW Electronics*, 257 S.W.3d at 703. The decedent was arrested for public intoxication and placed in jail. *Id*. at 702. The following day, he made a phone call to his mom to arrange his bail. *Id*. On the day he was supposed to be released, he was found dead in his cell, hanging from the telephone cord provided by JCW Electronics. *Id*. His mom sued the city for his death and joined JCW as a defendant. *Id*. At trial, the jury attributed sixty percent of the liability to the decedent. *Id*. at 703. Although the decedent's mom argued that Chapter 33 should not apply to breach of implied warranty claims, the Court stated that these claims have been "historically included" when comparing fault in tort-based litigation. *Id*. at 707. Because the jury found the decedent sixty percent responsible for his death, for reasons not given in the case, his contributory negligence barred recovery. *Id*. The Court rendered judgment that claimants take nothing. *Id*. at 708.

Mr. Jones, like the patient in *Providence Health Center*, was under the care of staff who failed to make a comprehensive assessment risk of suicide. *Providence Health Center*, 262 S.W.3d at 326. Mr. Jones' suicide, however, happened while under the direct supervision of IDC employees, not thirty-three hours after being released by a health care provider. *See Id*. Mr. Jones' act of committing suicide was not "the sole case of the damages sustained," but rather his death followed IDC's negligence. See Tex. Civ. Prac. & Rem. Code Ann. § 93.001(a)(2). Based on both

Section 33.001, the interpretation of Section 93.001 under 33.001, and the above case law, there exist sufficient facts and evidence to show that the affirmative defense of proportionate responsibility fails in this case.

Even though in *JCW Electronics*, the inmate's contributory negligence precluded recovery, there is no reason provided as to how fault was allocated. *See JCW Electronics*, 257 S.W.3d at 618. There is nothing indicating that the decedent's proportionate liability was due solely to the fact of suicide. *Id*. This missing information taken with the highly distinguishable facts of Mr. Jones' case, limits the persuasiveness of *JCW Electronics*.

Because there is no evidence that Mr. Jones' son or father played any part in Mr. Jones' death, the issue of proportionate responsibility is unlikely to extend to them in any way. Additionally, the court will likely find that Mr. Jones did not violate an applicable standard of care and is thus not proportionally liable for his suicide. While IDC has not conceded that they owed a heightened duty of care to Mr. Jones as the entity that detained him and had control over his mental health care needs, there is, in our possession, sufficient facts and evidence to show this. This case alleges, and discovery has helped establish, numerous facts that demonstrate how IDC's negligence led to Mr. Jones' death. There is nothing in our possession to support the notion that Mr. Jones is proportionally responsible.

CONCLUSION

IDC will likely be unable to successfully assert the suicide defense or the unlawful acts doctrine to shift liability to Mr. Jones and will likely be unable to assert the proportionate responsibility defense to preclude recovery. The theory of this case is that Mr. Jones' action of committing suicide was not "the sole cause of the damages sustained," but rather that his death flowed from IDC's negligence. See Tex. Civ. Prac. & Rem. Code Ann. § 93.001(a)(2). Based on